No. 91-7094

In The

Supreme Court of the United States

October Term, 1991

WILLIE LEE RICHMOND,

Petitioner,

vs.

SAMUEL A. LEWIS, Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

GRANT WOODS
Attorney General of
the State of Arizona

*PAUL J. MCMURDIE
Chief Counsel
Criminal Appeals Section

JACK ROBERTS
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686

Attorneys for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. If a state appellate court does not unanimously agree about the existence of a statutory aggravating circumstance, is it violative of the federal Constitution for the justices that are in the minority on the existence of the circumstance to nonetheless consider the circumstance when they conduct their independent review of the record to determine the propriety of the death sentence?

2. When a state supreme court justice concurs in the majority opinion that includes the requirement that the state supreme court independently review the record, does the federal Constitution require a remand to the state court to determine whether that justice independently reviewed the record?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED

28 U.S.C. § 2254.

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

SUMMARY OF ARGUMENTS

Richmond makes two claims why his death sentence requires further review in state court. Richmond's first claim is that it was error for two justices to consider, in their independent review, the aggravating circumstance of especially heinous after three justices found the circumstance did not exist. Richmond may not obtain relief on this claim because the law as dictated by this Court in 1983 did not mandate a reviewing court to consider only those statutory aggravating factors that are found by a majority of the court. In order to accept Richmond's arguments, this Court would have to create a "new rule" in violation of *Teague v. Lane*.

The only issue properly before the Court is whether the record is sufficient to support the conclusion reached by the Arizona minority justices that Richmond committed the crime in an especially depraved manner. Under this Court's holding in *Jeffers v. Lewis*, a habeas court is to view the evidence in the light most favorable to the prosecution. A review of the record in this light supports the panel decision below that the minority justices did act in a rational manner.

The second claim raised by Richmond is that the justices who did not find the aggravating circumstance of

heinousness, failed to consider the mitigating evidence in their independent weighing of the evidence before affirming the death sentence. The Arizona Supreme Court reweighs the aggravation and mitigation in every capital case to determine if the death penalty is appropriate. Under Arizona law, the death penalty is proper only if the aggravation outweighs the mitigation. In their opinion, the justices stated that they found Richmond's death sentence to be proper, and concurred in the majority opinion. The opinion in which they concurred specifically stated that the court did an independent review, and discussed the mitigation proffered by Richmond. Such a record is sufficient for a habeas court to conclude that the mitigation was considered.

STATEMENT OF THE CASE

On August 25, 1973, Willie Richmond and his 15-year-old girlfriend, Faith Erwin, went to the Bird Cage Bar in Tucson to see their friend Rebecca Corella, a nude dancer at the bar. Corella came out of the bar with Bernard Crummett, a Vietnam veteran. The two sat in the car Richmond had driven over and talked. After a while Richmond, who had been waiting with Erwin nearby, joined the two in the car. An argument ensued between Richmond and Crummett because Crummett wanted Erwin to perform an act of prostitution with him, and Richmond refused to allow it. Corella agreed, however, to prostitute herself with Crummett for $20. Erwin then joined the three in the car and Richmond drove them to a hotel on Benson Highway in Tucson where Corella was staying. *Richmond v. Ricketts*, 640 F. Supp. 767, 770 (D. Ariz. 1986).

Richmond acted as Corella's pimp, and Corella gave him the $20 Crummett paid her in advance of the act.

Richmond switched the $20 bill for a $10 bill, then harassed Crummett about trying to give them less money. Crummett opened his wallet to pay the additional $10. Corella, apparently observing what she believed to be a large amount of money, notified Richmond that Crummett was "loaded." 640 F. Supp. at 770. Corella and Crummett then went into one of the hotel bedrooms. While they were gone, Richmond whispered to Erwin that he intended to rob Crummett, but that Erwin should not say anything.

When Corella and Crummett came out of the bedroom, all four people got back in the car. With Richmond again driving, they headed toward the west end of 22nd Street in Tucson, just west of "A" Mountain. 640 F. Supp. at 771. Upon reaching the end of the paved road, which is in a desert area, Richmond stopped the car and got out. Corella, who was in the back seat with Crummett, informed Crummett that they had a flat tire and he should get out and help. Immediately after Crummett exited the car, Richmond struck Crummett, knocking him to the ground and rendering him unconscious. Richmond then walked around to the desert on the car's passenger side and picked up some large rocks. Returning, Richmond stood directly over Crummett and threw the rocks at Crummett's head. *Id.*

The record is not clear whether it was Corella, Richmond or both who removed objects from Crummett. However, Crummett's pockets were turned inside out, and his wallet and watch were taken. Both Corella and Richmond shared in the robbery proceeds, and Richmond later threw Crummett's watch out of the car window. 640 F. Supp. at 771. Following the robbery, Corella, Richmond, and Erwin reentered the car. The car ran over

Crummett two separate times from two different directions as Crummett laid in the street. On the first pass, a car tire directly struck Crummett's head, inflicting a massive head injury that caused Crummett's death. The second pass occurred more than 30 seconds later, after Crummett's heart had already stopped beating and he had suffered massive blood loss. On the second pass, a car tire drove over Crummett's chest, causing substantial injuries. On one of the passes, the car drug Crummett's body for a short distance. The body was discovered in the street several hours later. 640 F. Supp. at 771.

Richmond was tried by a jury on charges of first-degree murder and robbery, with evidence presented of both premeditated first-degree murder and first-degree murder under the felony-murder rule. Richmond was convicted of both counts. Following an aggravation/mitigation hearing pursuant to A.R.S. § 13-454, the trial court sentenced Richmond to between 15 and 20 years on the robbery charge, and the death penalty for the murder charge. *Richmond v. Ricketts*, 640 F. Supp. at 771-72.

Under Arizona law an automatic appeal was filed directly with the Arizona Supreme Court. During its pendency, Richmond filed a petition for post-conviction relief in the trial court. The petition was denied, and Richmond sought review. The Arizona Supreme Court consolidated the two appeals and affirmed both the convictions and death sentence. *State v. Richmond*, 560 P.2d 41 (Ariz. 1976). This Court denied Richmond's petition for certiorari. *Richmond v. Arizona*, 433 U.S. 915 (1977).[1]

---

[1] During the pendency of the automatic appeal, Richmond was convicted of a prior charge of first degree murder for

(Continued on following page)

Richmond then petitioned for a writ of habeas corpus in federal district court challenging both his murder conviction and death sentence. The district court affirmed the conviction, but invalidated the death sentence, ruling the state statute as written violated the Constitution by limiting to four the number of mitigating factors that a defendant could present to the sentencing judge. *Richmond v. Cardwell*, 450 F. Supp. 519 (D. Ariz. 1978). Both Richmond and the State appealed that decision. Shortly thereafter, the Arizona Supreme Court also found Arizona's death sentencing statute unconstitutional for the same reasons. In that opinion, the court severed the unconstitutional limitation on mitigation, held that a defendant could present anything relevant in mitigation, and affirmed the remainder of the statute. *State v. Watson*, 586 P.2d 1253 (Ariz. 1978), *cert. denied*, 440 U.S. 924 (1979). Following this decision, the Arizona Supreme Court vacated every pending Arizona death sentence, including Richmond's, and remanded each case to the superior court for a resentencing where the defendant could present any relevant mitigation. The Ninth Circuit remanded the case to the district court pending the resentencing. The district court ruled in Richmond's favor. The Ninth Circuit later affirmed a subsequent district court ruling that the Arizona Supreme Court properly interpreted the Arizona statute and properly ordered the resentencings. *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir.), *cert. denied*, 459 U.S. 1055 (1982) (affirming 513 F. Supp. 4 (D. Ariz. 1980),

---

(Continued from previous page)

which he received a life sentence. The homicide in that case occurred before the effective date of the Arizona death sentencing statute, so that penalty was not available. *See State v. Richmond*, 540 P.2d 700 (Ariz. 1975).

a class action for all Arizona death row inmates). In the meantime, the district court denied those of Richmond's claims that were not contained in the class action, and Richmond did not appeal.

Following an evidentiary hearing in March, 1980, the Arizona trial court found the existence of three aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency, and resentenced Richmond to death. Once again, an automatic appeal was filed with the Arizona Supreme Court. *Richmond v. Ricketts*, 640 F. Supp. at 772. During the pendency of the second appeal, Richmond filed a second petition for post-conviction relief, claiming that the statute was being discriminatorily applied to him based on his race (black) and his poverty. The trial court summarily denied the petition, and Richmond filed for review with the Arizona Supreme Court. The supreme court consolidated the two actions, and affirmed the sentence of death by a divided court. *State v. Richmond*, 666 P.2d 57 (Ariz. 1983). Raising various constitutional issues, Richmond moved for rehearing before the Arizona Supreme Court but that court refused to reconsider its decision. This Court again denied Richmond's petition for certiorari. *Richmond v. Arizona*, 464 U.S. 986 (1983).

Richmond filed a third petition for post-conviction relief in the state trial court, raising many of the same grounds presented in the motion for rehearing before the Arizona Supreme Court. The trial court summarily denied this petition, and the Arizona Supreme Court declined review. *Richmond v. Ricketts*, 640 F. Supp. at 773. Richmond then filed this third habeas corpus petition shortly before his scheduled execution date.

Richmond claimed that his Sixth and Eighth Amendment rights were violated when the state supreme court

affirmed his death sentence after overturning the trial court's finding that the crime was committed in an especially cruel and heinous manner. *Richmond v. Ricketts*, 640 F. Supp. at 796. The district court rejected the claim finding:

> The aggravating circumstances found present in this case are according to the Arizona Supreme Court's opinion very heavily weighted. One of the aggravating circumstances found in this case is that Richmond has been convicted and sentenced for another first degree murder, entirely separate from the killing in this case. This court has already held that there was no abuse of discretion in the weight given to the mitigating circumstances here.
>
> The state court record indicates that the state supreme court conducted a careful and thorough review of the issues in this case. This court therefore concludes that even though the Arizona Supreme Court reversed one of the aggravating circumstances found in this case, it was not a denial of due process under the sixth or eighth amendments to not send the case back for another sentencing.

640 F. Supp. at 796. Richmond appealed from the district court's decision.

After this Court rendered its decision in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990), Richmond filed a supplemental brief in the Ninth Circuit contending that the finding by the two Arizona Supreme Court justices that his crime was "depraved" rendered his sentence unconstitutional under *Godfrey v. Georgia*, 446 U.S. 420 (1980). (Supplemental Brief at 5-6.) Richmond also argued that the concurring justices who found the statutory aggravating circumstance did not exist erred by not independently reweighing the "sufficiency of the mitigating evidence in this case." (*Id.* at 10.) The Ninth Circuit Court

of Appeals rejected Richmond's claim that the two minority justices who found the existence of the heinous aggravating circumstance could not use that factor to affirm Richmond's death sentence.

> The fact that a majority of the court did not concur in this finding [existence of heinousness under (F)(6)], however, does not deny that the Justices who did concur in it provided an adequate limiting construction. The relevant point is that members of the court who premised their votes on the challenged factor undertook the deliberations and analysis constitutionally required.

(J.A. at 125, n.9.) Regarding Richmond's claim that two of the justices had not independently weighed the mitigation, the court of appeals found that Arizona was not a "weighing" state, and therefore did not address the specifics of the argument. (J.A. at 130-32.) This petition for certiorari followed.

ARGUMENTS

I. WHEN A STATE APPELLATE COURT DOES NOT UNANIMOUSLY AGREE ABOUT THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE, IT DOES NOT VIOLATE THE CONSTITUTION FOR THE MINORITY JUSTICES TO NONETHELESS CONSIDER THAT CIRCUMSTANCE WHEN THEY CONDUCT THEIR INDEPENDENT REVIEW OF THE RECORD TO DETERMINE THE PROPRIETY OF THE DEATH SENTENCE.

Once again an Arizona capital defendant seeks review of the Arizona Supreme Court's application of the aggravating circumstance of "especially heinous, cruel or depraved." *See Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092 (1990); *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990). However, unlike the previous cases, the majority

of the Arizona Supreme Court in this case found that the circumstance did not exist. (J.A. at 92-96, 96, Cameron and Gordon concurring, Feldman dissenting.) Richmond claims that the two justices who found that the facts constituted a statutory aggravating circumstance improperly relied on the circumstance in conducting their independent review of the record and affirming Richmond's death sentence. For the reasons discussed below, the Arizona Supreme Court correctly applied the constitutional principles in effect at the time of its decision, and Richmond is not entitled to relief.

A. A Federal Habeas Corpus Court's Review Is Limited to the Specific Constitutional Requirements Dictated at the Time the Defendant's Conviction Became Final on Direct Appeal in the State Court. At the Time That Richmond's Direct Appeal Became Final, There Was No Constitutional Requirement Prohibiting a State Court Justice From Considering Upon Independent Review an Aggravating Circumstance Vacated by a Majority of the Court. In Order To Accept Richmond's Arguments, This Court Would Have To Create a New Rule, Which Would Violate *Teague v. Lane*.

Richmond contends that it was error for two of the justices of the Arizona Supreme Court to consider the "heinous" aggravating circumstance in their independent review, when the three other justices found the circumstance did not exist. (Opening Brief at 30-36.) The error, argues Richmond, is that, to consider the circumstance, the minority would have had to construe the statutory aggravating circumstance beyond the legal and factual limitations found to exist by the majority of the court. (*Id.* at 34-35.) Richmond's argument assumes that the Constitution mandates unanimity, or at least a majority vote, by

the state court justices concerning the existence of an aggravating circumstance before a death penalty may be affirmed. Richmond's assertions concerning the facts necessary to affirm the circumstance are incorrect, and the rule of law and relief Richmond seeks would create a "new rule" in violation of the law set forth in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989) (plurality opinion).[2]

1. The law set forth in *Teague v. Lane* prohibits a habeas court from granting relief if to do so would create a "new rule."

As a threshold matter, this Court always determines first if the relief the habeas corpus petitioner seeks would create a "new rule." *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 2944 (1989) (citing *Teague v. Lane*, 109 S. Ct. at 1069). A state prisoner seeking habeas corpus relief in federal court cannot benefit from a "new rule." *Id.* A

---

[2] This *Teague* argument was not presented in the response to the petition for certiorari. The argument is not waived, however, because the *Teague* "threshold question" is one this Court addresses in all collateral review cases unless the Court, in the exercise of its jurisdiction, accepts the State's affirmative waiver of the retroactivity issue. *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 2718 (1990). The State would note that the issue of retroactivity found to be dispositive was not raised or argued by the parties in either *Teague* or *Penry*. *Teague*, 109 S. Ct. at 1084 (Brennan, J., dissenting); *Penry*, 109 S. Ct. at 2959 (Brennan, J., concurring in part, dissenting in part). Also, a respondent may defend the judgment of the court of appeals on any ground supported by the record. *Lewis v. Jeffers*, 110 S. Ct. 3092, 3105 (1990) (Blackmun, J., dissenting); *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). The State believes it is important for this Court to consider the *Teague* claim in reviewing this case, which has been in the federal system for fast approaching 10 years.

"new rule" arises when the relief sought "breaks new ground or imposes a new obligation on the states." *Penry*, 109 S. Ct. at 2944; *Teague*, 109 S. Ct. at 1070. A "new rule" is imposed if "the result was not *dictated* by precedent" existing at the time the prisoner's conviction became final. *Penry*, 109 S. Ct. at 2944 (emphasis in original); *Teague*, 109 S. Ct. at 1070. The rationales for the "new rule" jurisprudence – finality, predictability, and comity – are undermined "to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent." *Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130, 1135 (1992); *Butler v. McKellar*, 494 U.S. 407, 110 S. Ct. 1212, 1214 (1990). The only exceptions to the "new rule" doctrine occur if (1) the sought-after rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or (2) the procedures at issue "implicate the fundamental fairness of the trial." *Teague*, 109 S. Ct. at 1075-76. Neither of the exceptions is implicated by Richmond's arguments, so they will not be addressed by the State.

2. At the time Richmond's sentence became final, no United States Supreme Court precedent "dictated" the result Richmond now seeks.

For *Teague* purposes, Richmond's case became final on November 14, 1983. *Richmond v. Arizona*, 464 U.S. 986 (1983). By that date, this Court had issued four opinions that are relevant to the issues raised in this case – *Godfrey v. Georgia*; *Zant v. Stephens*, 462 U.S. 862 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983); and *California v. Ramos*, 463

U.S. 992 (1983).[3] The determination whether the Arizona Supreme Court correctly applied the law to Richmond requires a review of this Court's cases prior to November 14, 1983.

In *Godfrey*, a plurality of this Court invalidated a death sentence that was based solely on the aggravating circumstance that the killing was "outrageously or wantonly vile, horrible and inhuman." 446 U.S. at 428-29. The jurors in *Godfrey* had not been given a limiting instruction regarding the circumstance, and the limiting application of the circumstance by the Georgia Supreme Court in that case was deemed vague and imprecise, causing arbitrary and capricious application of the death penalty, in violation of the Eighth Amendment. *Id.* Because the challenged aggravating circumstance was the *only* aggravating circumstance found by the jurors, the death penalty was vacated.

In *Stephens*, the Georgia Supreme Court determined that Georgia's "substantial history of serious assaultive criminal convictions" aggravating circumstance was unconstitutionally vague. 462 U.S. at 867. The Georgia Supreme Court therefore set aside the jurors' finding regarding that circumstance, but nonetheless affirmed Stephens' death sentence based on two remaining valid aggravating circumstances. *Stephens v. State*, 227 S.E.2d 261, 263 (Ga.), *cert. denied*, 429 U.S. 986 (1976). This Court ultimately granted certiorari to determine whether a death sentence must be vacated if one of the aggravating

---

[3] The Arizona Supreme Court denied Richmond's motion for rehearing on June 28, 1983, 6 days after this Court issued *Zant v. Stephens*. On the date of the denial of rehearing, this Court had not issued *Barclay v. Florida* or *California v. Ramos*, both decided on July 6, 1983.

circumstances found by the jurors is set aside on appeal. 462 U.S. at 864. This Court held that the answer depended on two things: first, the function of aggravating factors under state law and, second, the reason why the aggravating factor was determined to be invalid. 462 U.S. at 864.

Under the Georgia capital sentencing scheme, aggravating factors merely narrow the class of persons eligible for the death penalty; they play no other role in the sentencing determination. 462 U.S. at 872-73. This Court reaffirmed Georgia's sentencing scheme, noting:

> Our cases indicate . . . that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.

462 U.S. at 878-79 (emphasis in original). This Court noted that, to set aside a "vague" aggravating circumstance on appeal did not, under the Georgia sentencing scheme, necessarily render the death sentence constitutionally infirm. A reversal would be required only if the State's evidence supporting the circumstance would have been inadmissible for jury consideration without the circumstance, or if the circumstance was held invalid to protect constitutionally protected conduct. 462 U.S. at 885-86. Finding neither in *Stephens*, the Court affirmed the sentence, and specifically declined to determine if its analysis would change if the state statutory scheme specifically instructed the sentencing judge or jurors to weigh

statutory aggravating circumstances against mitigation. 462 U.S. at 890.

The question left open in *Stephens* was resolved in *Barclay v. Florida*. In *Barclay*, the advisory sentencing jury recommended 7-5 that Barclay receive a life sentence. 463 U.S. at 944. The trial court found various statutory and nonstatutory aggravating factors and no mitigating factors. Based on these findings, it rejected the jurors' recommendation of a life sentence, and imposed death. *Id.* at 944-45. The Florida Supreme Court affirmed, and this Court granted certiorari to determine whether the death penalty could be imposed if the sentencer, in violation of state law, considered a nonstatutory aggravating circumstance. *Id.* at 941-42.

Justice Rehnquist, writing for a plurality of the Court, stated that the resolution of the question revolved around the "function of the finding of aggravating circumstances under Florida Law and on the reason why this aggravating circumstance is invalid." *Id.* at 951. Justice Rehnquist noted that Florida law differed materially from the Georgia statute reviewed in *Stephens*.

> Thus the Florida statute, like the Georgia statute at issue in *Zant v. Stephens*, . . . requires the sentencer to find at least one valid statutory aggravating circumstance before the death penalty may even be considered, and permits the trial court to admit any evidence that may be relevant to the proper sentence. Unlike the Georgia statute, however, *Florida law requires the sentencer to balance statutory aggravating circumstances against all mitigating circumstances and does not permit nonstatutory aggravating circumstances to enter into this weighing process.*

Id. at 954 (emphasis added, citation omitted). As in *Stephens*, the plurality opinion noted that the evidence supporting the nonstatutory aggravating circumstance was

otherwise admissible, and the trial court had not improperly based its decision on constitutionally protected activity. *Id.* at 956. Therefore, the plurality concluded that the crux of the issue was whether the trial court's consideration of the improper aggravating circumstance so infected the balancing process created by the Florida statute that Barclay's sentence could not stand. *Id.*

Noting that there was no "constitutional defect in a sentence based on both statutory and nonstatutory aggravating circumstances," the plurality affirmed the death sentence. 463 U.S. at 957. Whether the Florida Supreme Court had misapplied its own law in affirming Barclay's death sentence was a mere error of state law; and even if true, "mere errors of state law are not the concern of this Court." *Id.* Finally, the plurality rejected Barclay's claim that a remand was required, noting:

> There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance. . . . "What is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."

Id. at 958 (citing *Zant v. Stephens*, 462 U.S. at 879 (emphasis in original)).

Justice Stevens, joined by Justice Powell, concurred in the result, but differed on the constitutional analysis required to review a state supreme court's decision. Justice Stevens opined that Florida law prohibited the use of nonstatutory aggravating circumstances, and that "evidence supporting nonstatutory factors simply may not be introduced into evidence at any stage in the sentencing proceeding." 463 U.S. at 965. He found that the Florida rule prohibiting the use of nonstatutory factors afforded

greater protection to the accused than the federal Constitution required. The federal Constitution allows consideration, at the selecting phase, of information not directly related to statutory aggravating or statutory mitigating factors, as long as the information relates to the character of the defendant or the circumstances of the crime. *Id.* at 967.

Justice Stevens rejected Barclay's claims that the death sentence findings violated *Godfrey*:

> We need not decide whether the principles of *Godfrey* have been violated . . . because other statutory aggravating circumstances are valid. In contrast, in *Godfrey*, once the "broad and vague" aggravating circumstance was struck down, no valid statutory aggravating circumstances remained.

463 U.S. at 969 n.16. Justice Stevens' analysis was the same even if the jurors had found mitigation. 463 U.S. at 967 n.13. As long as the federal Constitution did not bar introduction of the evidence underlying the invalid factor, the state law error did not require that the death penalty be set aside. *Id.*

In *California v. Ramos*, 463 U.S. 992 (1983), this Court addressed whether, during the sentencing phase of a capital trial, the jurors could be informed that the governor could commute or modify a life sentence. 463 U.S. at 995-96. This Court noted that, unlike the guilt/innocence phase of a trial, the penalty phase involves no "central issue." *Id.* at 1008. Rather, once the jurors find that the defendant falls within the legislatively defined category of persons eligible for the death penalty, the jurors then may consider all relevant factors to determine whether death was the appropriate punishment. *Id.* The jurors' choice between life and death must be individualized, "[b]ut the constitution does not require the jury to ignore

other possible factors in the process of selecting . . . those defendants who will actually be sentenced to death." *Id.* at 1008 (citing *Zant v. Stephens*, 462 U.S. at 878).

For *Teague* purposes, after *Godfrey*, *Stephens*, *Barclay*, and *Ramos*, the law "dictated" to apply in Richmond's case can be succinctly summarized: First, the Constitution requires that facially vague aggravating circumstances be sufficiently limited. *Godfrey*, 446 U.S. at 428-29. Second, the invalidation on appeal of one of many aggravating circumstances would not necessarily violate the Constitution unless the evidence presented at the selection stage would have been different but for the invalid circumstance, *Stephens*, 462 U.S. at 885-86; *Barclay*, 463 U.S. at 956 (plurality), 463 U.S. at 967 n.13 (Stevens, J., concurring), or the aggravating circumstance was set aside because the factor was based on constitutionally protected activity. *Stephens*, 462 U.S. at 885-86. Third, even in weighing states, the Constitution does not prohibit the sentencer from considering nonstatutory aggravating circumstances in the selection process. *Barclay*, 463 U.S. at 957 (plurality); 463 U.S. at 967 n.13 (Stevens, J., concurring). Fourth, a mere error in the application of state law does not mandate the reversal of a death sentence. *Barclay*, 463 U.S. at 957; *accord Wainwright v. Goode*, 464 U.S. 78, 86 (1983) (mere error of state law regarding applicability of nonstatutory aggravation does not create constitutional violation). Fifth, in a weighing state, a state supreme court may examine the balance between aggravation and mitigation after vacating an invalid circumstance and affirm a death sentence. *Barclay*, 463 U.S. at 958 (plurality). And Sixth, once a capital defendant falls within the legislatively defined category of persons eligible for the capital sentence, the selection must be

"individualized." Ramos, 463 U.S. at 1008; *Barclay*, 463 U.S. at 958; *Stephens*, 462 U.S. at 879 (emphasis in original).

3. The law of Arizona and its application in this case indicate that the Arizona Supreme Court comported with *Godfrey, Stephens, Barclay* and *Ramos*.

A review of the Arizona procedures and the Arizona Supreme Court's opinion shows that Arizona clearly comported with these dictates even though the state court opinion issued prior to this Court's decisions.[4] A.R.S. § 13-703(E) provides:

> In determining whether to impose a sentence of death or life imprisonment . . . the court shall take into account the aggravating and mitigating circumstances included in subsections F [aggravation] and G [mitigation] of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

[4] The State realizes that to believe that the Arizona Supreme Court actually applied all of these cases in its *Richmond* opinion is a legal fiction, because only *Godfrey* was issued at the time it rendered its decision. While the *Stephens* opinion issued 6 days prior to the Arizona Supreme Court's denial of Richmond's motion for reconsideration, Richmond did not bring it to the court's attention, even though he had cited in his motion for rehearing this Court's certified question in *Zant v. Stephens*, 456 U.S. 410 (1982). (Motion for Rehearing, filed June 7, 1982, at 5.) Likewise, Richmond raised his contention that the two minority judges had erred in relying on (F)(6) in his petition for certiorari, but cited neither *Stephens* nor *Barclay* as controlling. (*Richmond v. Arizona*, No. 83-5499, Pet. for Cert. at 5-14.) To allow Richmond to argue that *Stephens* and *Barclay* dictated the result he now seeks would be the height of arbitrariness because Richmond did not even believe they controlled his case in 1983.

A.R.S. § 13-703(F) provides a specific list of aggravating circumstances to be considered in capital sentencing decisions, and further requires the trial court to consider any relevant mitigating evidence in determining whether to impose a death sentence. *State v. Gretzler*, 659 P.2d 1, 12-13 (Ariz. 1983). When none of the statutory aggravating circumstances is found, the statute prohibits the death penalty. *Id.*; *State v. Madsen*, 609 P.2d 1046, 1053 (Ariz.), *cert. denied*, 449 U.S 873 (1980). When one or more of the statutory aggravating circumstances is found, and no mitigation exists, the statute requires the death penalty to be imposed. *State v. Jordan*, 672 P.2d 169, 173 (Ariz. 1983); *State v. Gretzler*, 659 P.2d at 12. When both aggravating and mitigating circumstances are found in a given case, however, the trial court must determine whether the mitigating circumstances are "sufficiently substantial to call for leniency." A.R.S. § 13-703(E); *State v. Gretzler*, 659 P.2d at 13. The balancing procedure is not a mechanistic determination of the number of aggravating and mitigating circumstances presented, but instead requires the trial court to determine and compare the "gravity" of the circumstances found. *State v. Gretzler*, 659 P.2d at 13.

As an additional safeguard, the Arizona Supreme Court conducts a de novo review of the trial court's determinations. *State v. Rockwell*, 775 P.2d 1069, 1079 (Ariz. 1989); *State v. Gretzler*, 659 P.2d at 14; *State v. Richmond*, 560 P.2d at 51. On mandatory appeal, the Arizona Supreme Court does not review the record merely to determine if the trial court "properly imposed the death penalty," but also determines whether *it* believes "that

the death penalty should be imposed." *State v. Rockwell*, 775 P.2d at 1080 (citing *State v. Watson*, 628 P.2d 943, 946 (Ariz. 1981)). In conducting its independent review, the Arizona Supreme Court balances "all relevant factors" against the aggravating circumstances to determine whether the death sentence should be imposed, resolving all doubt against imposition of the death penalty. *State v. Rockwell*, 775 P.2d at 1079-80; *State v. Marlow*, 786 P.2d 395, 402 (Ariz. 1989) (citing *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982)).

In Richmond's first appeal to the Arizona Supreme Court, that court set forth its standard of review as follows:

> It has been our policy not to disturb the sentence imposed by the trial court, absent a clear abuse of discretion, when it is within the statutory limits. . . . However, the gravity of the death penalty requires that we painstakingly examine the record to determine whether it has been erroneously imposed. . . . Furthermore, because A.R.S. § 13-454 [renumbered now as § 13-703] sets out the factors which must be found and considered by the sentencing court, we necessarily undertake an independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances. . . . We must determine for ourselves if the latter outweigh the former when we find both to be present.

(J.A. at 61, citations omitted.) On appeal from the resentencing, the Arizona Supreme Court again set forth that court's standard of review:

> The sentencing statute, A.R.S. § 13-703, provides that the death penalty shall be imposed if the court finds one or more aggravating circumstances and "there are no mitigating circumstances sufficiently substantial to call for leniency." In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give each. We also independently determine the propriety of the sentence.

(J.A. at 88.)

In conducting its independent review, the court divided on various aspects of the case. Justice Holohan, writing for himself and Justice Hays, found that the trial court had correctly found three aggravating circumstances: (1) Richmond had a prior murder conviction in which a life sentence was imposed (A.R.S. § 13-703(F)(1)); (2) Richmond had prior felony convictions involving violence – armed kidnapping and murder (A.R.S. § 13-703(F)(2)); and (3) the offense was committed in an especially heinous manner (A.R.S. § 13-703(F)(6)). (J.A. at 88-89.) In addressing Richmond's claimed mitigation, Justice Holohan noted that the trial court had correctly found the following mitigating circumstances: first, Rebecca Corella and Faith Erwin were both involved in the crime but were never charged; second, the victim had been engaged in an illegal act of prostitution with Corella prior to being murdered and had also solicited an act of prostitution with Erwin, a minor; third, the jurors had been instructed regarding felony murder; and finally, Richmond's family was supportive of him and would suffer grief if the death penalty was carried out. (J.A. at 88-89.) Justice Holohan then reviewed Richmond's claim of changed character.

> The trial court did consider evidence regarding appellant's change in character, but was unable to make a definitive finding on the matter. In *State v. Watson* (II), [628 P.2d 943 (Ariz. 1981)], we held that evidence revealing a

> substantial improvement of a defendant's character could be viewed as a mitigating factor. In the case at bench the trial court was not convinced that appellant's character had changed. We do not believe this position was unreasonable. The trial court was able to observe appellant at the resentencing hearing and listen to his testimony. The trial court was also aware appellant had been in a very controlled environment while his alleged change of character took place, with much to gain from his good behavior. Additionally the judge had evidence before him of the lifestyle appellant led before his incarceration, including the fact he was involved in another murder. These facts cast sufficient doubt upon appellant's veracity so the trial court could reasonably decline to find the proffered evidence to be a mitigating factor. The court further found that there were no mitigating circumstances sufficiently substantial to call for leniency.

(J.A. at 89-90.) Thereafter, Justice Holohan concluded "[w]e believe the mitigation offered by appellant is not sufficiently substantial to outweigh the aggravating circumstances." (J.A. at 90.)[5]

---

[5] Richmond challenged the Arizona courts' handling of his changed-character evidence in his habeas corpus petition. The district court noted that Richmond had improved his communication skills and had developed religious beliefs. *Richmond v. Ricketts*, 640 F. Supp. at 795. The district court rejected the claim that Richmond had changed his character, however:

> [Richmond] had *always* been concerned about his family and friends and had been very helpful to them. Despite this, Richmond participated in the murder of two people, a robbery and a kidnapping. The prison officials that testified considered him to be well behaved but could not state what would

(Continued on following page)

Justice Cameron, writing for himself and Justice Gordon, stated that he agreed that the death penalty was "properly imposed in this case," but disagreed that the crime was "especially heinous and depraved." (J.A. at 92.) Justice Cameron rejected Justice Holohan's determination that "infliction of gratuitous violence on the victim" and "needless mutilation" existed. (*Id.* at 93.) Justice Cameron found, however, that Richmond's history of serious violent crime clearly placed him above the norm of first-degree murderers and therefore concurred in Justice Holohan's opinion except for the heinous finding. (*Id.* at 95-96.)

Justice Feldman, writing only for himself, dissented. He agreed with Justices Cameron and Gordon that the crime was not "heinous and depraved." (J.A. at 96.) Therefore, he concluded that the "imposition of the death penalty in this case is clearly based upon the character of the defendant." (*Id.*) Upon his reading and consideration of the record, and materials not presented to the trial court,[6] Justice Feldman concluded that Richmond's

---

(Continued from previous page)

> happen if he were not guarded when he was out of his cell or released into the general prison population. . . .
>
> Richmond therefore failed to present sufficient evidence in support of his claim that his character had changed. The decision to give this little or no weight as a mitigating factor calling for leniency is not an abuse of discretion nor did it violate Richmond's constitutional rights.

640 F. Supp. at 795. The court of appeals did not address the weight or sufficiency of Richmond's changed-character evidence.

[6] Justice Feldman relied on the opinion of Charles Doss, another former death row inmate [*State v. Doss*, 568 P.2d 1054

(Continued on following page)

changed-character evidence "tips the balance strongly in favor of reducing [Richmond's] sentence to life imprisonment." (*Id.*)[7]

The application of the six points of law recognized by this Court at the time of the Arizona Supreme Court's decision indicates that the court complied with those constitutional principles. Prior to issuing Richmond's opinion, the Arizona Supreme Court specifically recognized the applicability of *Godfrey* to the Arizona sentencing procedures. *State v. Gretzler*, 659 P.2d at 9. In *Richmond*, the Court applied the *Gretzler* factors, but simply disagreed whether they existed factually in this case. (J.A. at 86-87, 92-93, 96.) By rejecting the existence of the (F)(6) circumstance, the majority of the Arizona Supreme Court did not create a situation where evidence was then impermissibly introduced into the selection process of the sentencing procedures. All of the evidence considered by the minority justices on this point was produced at trial and the State offered no new evidence at the sentencing

---

(Continued from previous page)

(Ariz. 1977)], who wrote an editorial in *La Roca*, the Arizona State Prison newspaper, that Richmond's attitude and actions had substantially changed in the 10 years he had been on death row. This information had not been presented to the trial court and was outside the record on appeal. (J.A. at 99, n.1.); Rule 31.8, Ariz. R. Crim. P.

[7] Throughout Justice Feldman's opinion, he claims that the evidence before him was "uncontradicted," "unimpeached," "unrebutted," and "uncontested." (J.A. at 98-99.) A cursory review of the record indicates the reason why there was little empirical evidence to rebut or refute Richmond's assertions: Each time the State attempted to cross-examine Richmond's witnesses concerning evidence that would contradict his assertions, the trial court sustained Richmond's objections. (R.T. of Mar. 12, 1980, at 162, 174, 178.)

hearing to establish the (F)(6) circumstance. Likewise, the circumstance was not stricken because it improperly encroached on constitutionally protected activity. *See, e.g., Dawson v. Delaware*, ___ U.S. ___, 112 S. Ct. 1093 (1992).

That a majority of the Arizona Supreme Court found that the facts of the crime did not support the *statutory* circumstance does not necessarily preclude consideration of the facts of the crime in the selection phase of sentencing. The minority's consideration of the facts of the crime may be construed at most as being influenced by a *non-statutory* circumstance in their independent review, and would not be grounds for reversal under the Constitution as long as other, valid, aggravating circumstances existed. *Barclay*, 463 U.S. at 957 (plurality); 463 U.S. at 967 n.13 (Stevens, J., concurring).

Whether or not Arizona's sentencing procedures allow for the consideration of nonstatutory aggravating circumstances in the selection phase has not been definitively decided. The Arizona Supreme Court has stated on numerous occasions that the death penalty may be imposed only if the State proves at least one statutory aggravating circumstance. *State v. Gretzler*, 659 P.2d at 13. The court has held repeatedly, however, that once the State proves a valid aggravating circumstance, the trial court must consider all relevant evidence to determine the "propriety of imposing a death sentence in the particular case." *State v. Rockwell*, 775 P.2d at 1078; *State v. Lavers*, 814 P.2d 333, 352 (Ariz.), *cert. denied*, 112 S. Ct. 343 (1991); *State v. Ortiz*, 639 P.2d 1020, 1034 (Ariz. 1981), *cert. denied*, 456 U.S. 984 (1982) (trial court needs to be informed of "all relevant evidence" to make an "individualized decision"). In making the sentencing decision, the sentencing authority "should be well informed of the circumstances of the offense and the character, record, and propensities of the offender." *State v. Brewer*,

___ Ariz. ___, 826 P.2d 783 (1992); *Richmond v. Cardwell*, 450 F. Supp. 519, 521 (D. Ariz. 1978).[8] However, assuming arguendo that the two Arizona Supreme Court justices violated state law in considering *nonstatutory* aggravating evidence in determining whether the death penalty was appropriate, mere error of state law does not lie in a federal habeas corpus proceeding. *Estelle v. McGuire*, ___ U.S. ___, 112 S. Ct. 475 (1991); *Lewis v. Jeffers*, 110 S. Ct. at 3103 (determination of whether facts exist to support aggravating circumstance is a matter of state law not "cognizable in federal habeas proceedings"); *Barclay*, 463 U.S. at 957-58. Thus, even if Richmond is correct on this aspect of his claim, he is not entitled to relief.

Like *Barclay*, in his motion for rehearing before the Arizona Supreme Court, Richmond argued that only the trial court could engage in reweighing after the appellate court set aside an aggravating circumstance. (Motion for Rehearing at 5-6, filed June 7, 1983.) Richmond's argument was unavailing given the plurality opinion in

---

[8] The consideration of aggravating evidence not set forth in the statute is called, in most Arizona Supreme Court opinions, rebuttal to mitigation. Under A.R.S. § 13-703(C), however, once the State proves at least one valid statutory aggravating circumstance, the defendant must produce some mitigation or the death penalty must be imposed. *Gretzler*, 659 P.2d at 13. Once some mitigation is proffered by the defendant, the sentencing body must consider any evidence relevant to the nature and circumstances of the crime, or the character and background of the accused, to determine the propriety of the death penalty. *Rockwell*; *Lavers*; *Ortiz*; *Brewer*. Regardless whether one places a "non-statutory aggravation" or "rebuttal" title on the evidence, the sentencing body considers the evidence in the balance as either strengthening the aggravation or weakening the mitigation. Under either definition, the outcome is the same.

Barclay that the state supreme court could conduct such reweighing. 463 U.S. at 958.

Finally, in reviewing the record, Justice Holohan's opinion specifically considered all of the mitigation proffered by Richmond, and concluded, "We believe the mitigation offered by appellant is not sufficiently substantial to outweigh the aggravating circumstances." (J.A. at 88-90.) As dictated by *Ramos*, *Barclay*, and *Stephens*, the four members of the court who voted to affirm individually considered all mitigation and were not persuaded that it warranted leniency. Justices Holohan and Hays based this conclusion on the fact it was not Richmond's first murder conviction and the manner in which the murder was committed. (J.A. at 90.) Justices Cameron and Gordon based their conclusion on Richmond's criminal record alone. (J.A. at 95-96.) Under both decisions, the four justices properly gave Richmond an *"individualized"* review and determined that death was appropriate. The dictates of *Ramos*, *Barclay*, and *Stephens* were satisfied.

4. This Court's holdings in *Stringer v. Black*, *Parker v. Dugger*, and *Sochor v. Florida* do not alter the *Teague* analysis in this case.

In making the *Teague* argument above, the State of Arizona is well aware of this Court's holdings in *Stringer v. Black*, *Parker v. Dugger*, ___ U.S. ___, 111 S. Ct. 731 (1991), and *Sochor v. Florida*, 60 U.S.L.W. 4486 (June 8, 1992). In *Stringer*, this Court was asked to determine whether *Clemons v. Mississippi*, 494 U.S. 738 (1990), or *Maynard v. Cartwright*, 486 U.S. 356 (1988), created a "new rule" for cases decided prior to *Clemons*. 112 S. Ct. at 1133. This Court held that the principles from *Godfrey* and *Stephens* clearly dictated that a "weighing" state give

sufficient limiting definition to a facially vague aggravating circumstance. 112 S. Ct at 1136. Likewise, this Court found that, after *Barclay*, an appellate court in a weighing state could not be "permitted to apply a rule of automatic affirmance to any death sentence supported by multiple aggravating circumstances." 112 S. Ct. at 1137. Because the Mississippi Supreme Court *had not* applied a limiting definition for its "especially heinous" aggravating circumstance, and *had* engaged in automatic affirmances for sentencing error where there were multiple aggravating circumstances, this Court reversed. *Id.* at 1140.

Unlike Mississippi's Supreme Court, the Arizona Supreme Court correctly recognized the applicability of *Godfrey* to the Arizona sentencing procedures. *Gretzler*, 659 P.2d at 9. Likewise, the Arizona Supreme Court has never engaged in automatic affirmances in capital cases, and has always reweighed mitigation and aggravation on appeal. (J.A. at 61, 88.)[9] Richmond's contentions extend

---

[9] The Arizona Supreme Court instituted the practice not as a measure to salvage death sentences, but as a means to ensure the correct application of its sentencing laws. (J.A. at 60-61, 88-89.) Although the Arizona Supreme Court did not have the opportunity to apply *Clemons* and *Barclay* in the context of the arguments Richmond now makes, the court has indicated in other cases its belief that its reweighing practice comports with these cases. *State v. Robinson*, 796 P.2d 853, 862 (Ariz. 1990), *cert. denied*, 111 S. Ct. 1025 (1991) (elimination of an aggravating factor does not require remand for resentencing when record compels the finding, citing *Clemons*); *State v. McCall*, 677 P.2d 920, 933-35, 934 n.4 (Ariz.), *cert. denied*, 467 U.S. 1220 (1984) (when mitigation is insufficient, finding that trial court relied on improper aggravating circumstance does not mandate a new sentencing, citing *Barclay*); *see also State v. Emery*, 688 P.2d 175, 179 (Ariz. 1984) (judicial economy does not require a remand in cases where to do so would be "inefficient if not futile").

far beyond the holdings in *Barclay* and *Stephens*. The crux of Richmond's argument is that, once a majority of a state supreme court rejects the factual and legal existence of a statutory aggravating circumstance, the minority justices should be precluded from considering the facts they have found to exist in their independent weighing decision. Such a contention is clearly not dictated by *Stephens* or *Barclay*, and is likewise not dictated by *Clemons*, *Stringer*, *Parker*, or *Sochor*.

In *Clemons*, this Court specifically recognized and reaffirmed its previous holding that neither the Sixth nor Eighth Amendments mandated that a defendant was entitled to a jury trial on whether a capital sentence was appropriate. 110 S. Ct. at 1446-47. In *Walton*, this Court reiterated its *Clemons* holding and found that aggravating circumstances are not "elements" of a capital offense. 110 S. Ct at 3054-55. "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life." *Walton*, 110 S. Ct. at 3054 (citing *Poland v. Arizona*, 476 U.S. 147, 156 (1986)); *accord*, *Cabana v. Bullock*, 474 U.S. 376, 385 n.3 (1986) (Eighth Amendment requirement that capital punishment is reserved to those who actually killed, attempted to kill, or intended to kill, did not create "element" of "capital murder that must be found by the jury"). To impose a unanimity requirement on a sentencing body before its individual members may consider aggravation is contrary to this Court's holdings in *Clemons*, *Walton*, and *Bullock*, because it would tend to view aggravation as an "element" of the crime rather than a "guide" in making the choice between death and life.

In *Parker v. Dugger*, this Court applied its *Clemons* rule for the first time to a case where the state supreme

court vacated an aggravating circumstance on the basis of lack of evidence. 111 S. Ct. at 734. This Court found that the Florida Supreme Court did not reweigh mitigation and aggravation as a matter of state law. 111 S. Ct. at 738. This Court reversed because the Florida Supreme Court had misconstrued the trial court's finding regarding mitigation in conducting its harmless error analysis. 111 S. Ct. at 740. Such error deprived Parker of his constitutional right to individualized sentencing. *Id.*

In *Sochor v. Florida*, 60 U.S.L.W. at 4488-89, this Court reaffirmed its *Parker* holding, and held that, when a state supreme court invalidates an aggravating circumstance for lack of evidence, that court is required by *Clemons* either to reweigh or conduct a harmless error analysis. *Id.* Because the Florida Supreme Court does not reweigh, and the Florida Supreme Court did not make it clear that it did a harmless error analysis, this Court remanded to comply. *Id.*

Neither case answers the question before the Court at bar. In this case, two Arizona Supreme Court justices reviewed the evidence and found it did support the trial court's determination that Arizona's (F)(6) circumstance existed, and three other justices disagreed. The question then arises, did authority exist at the time Richmond's conviction became final that *"dictated"* that those two justices were required not to consider their findings in determining the propriety of the sentence? *Penry*, 109 S. Ct. at 2944 (emphasis in original). *Parker* and *Sochor* make clear that an aggravating circumstance that is unsupportable by the record cannot be considered in the balancing equation. What *Parker* and *Sochor* do not resolve is how an appellate court must resolve the issue when the appellate court justices disagree whether the circumstance exists. Because the issue is not resolved today, under

Teague this Court should not grant relief as long as the state courts engaged in a good-faith effort to apply the law as it then existed. A review of this Court's jurisprudence evidences that the Arizona Supreme Court cannot be faulted for not anticipating that this Court someday may require unanimity concerning aggravating circumstances.

Other jurisdictions, relying on this Court's jurisprudence, have specifically rejected the concept that a sentencing body must be unanimous before individual members may consider aggravation. In California, a defendant becomes death eligible if the jurors unanimously find a "special circumstance" allegation to be true. *People v. Bacigalupo*, 820 P.2d 559, 584 (Cal. 1991), *cert. pending*. Once a "special circumstance" is proved, however, the jurors are to balance specified aggravating circumstances against the mitigation to determine if the death penalty is appropriate. *Boyde v. California*, 494 U.S. 370, ___, 110 S. Ct. 1190, 1194 (1990). Under California's sentencing scheme, while the jurors must unanimously agree on the special circumstance, unanimity is not required on the existence of the aggravating circumstance used in the balancing equation. *Bacigalupo*, 820 P.2d at 583. The California Supreme Court, relying on this Court's finding that aggravating circumstances are not elements of a crime, has steadfastly refused to find that the Constitution mandates unanimity on the existence of aggravating circumstances before a circumstance may be considered. *Bacigalupo*, 820 P.2d at 583-84; *People v. Andrews*, 776 P.2d 285 (Cal. 1989). In California, this is true even if the jurors could not find one aggravating circumstance by a majority vote. *People v. Jackson*, 618 P.2d 149, 206 (Cal. 1980) (Mosk, J., dissenting), *cert. denied*, 450 U.S. 1035 (1981); *accord, Jones v. State*, 569 So. 2d 1234,

1238 (Fla. 1990) (juror unanimity not required in consideration of aggravation); *James v. State*, 453 So. 2d 786, 791-92 (Fla.), *cert. denied*, 469 U.S. 1098 (1984) (unanimity not required on advisory vote concerning penalty recommendation or *Enmund* finding).

In Virginia, where the jurors must be unanimous regarding their belief concerning the ultimate penalty, the Virginia Supreme Court has refused to find that the Constitution requires juror unanimity concerning which of the varying predicates they rely on in finding an aggravating factor. *Clark v. Commonwealth*, 257 S.E.2d 784, 791-92 (Va. 1979), *cert. denied*, 444 U.S. 1049 (1980). The federal courts in reviewing the Virginia practice have also refused to find a constitutional violation. *Briley v. Bass*, 584 F. Supp. 807, 819 (E.D. Va.), *aff'd*, 742 F.2d 155 (4th Cir.), *cert. denied*, 469 U.S. 893 (1984); *see also Bunch v. Thompson*, 949 F.2d 1354, 1367 (4th Cir. 1991), *cert. pending*.[10]

The State of Arizona has been unable to find any cases from this Court or other jurisdictions that would lend support for Richmond's argument that the Constitution requires unanimity before appellate jurists may apply an aggravating circumstance in their independent

---

[10] In Ohio, while a three-judge trial panel must vote unanimously to impose a death sentence, the statutes place no similar unanimity requirement on the appellate courts that must independently reweigh the aggravation and mitigation on appeal. Ohio R.C. 2929.03(D)(3); *State v. Sowell*, 530 N.E.2d 1294, 1301 (Ohio 1988), *cert. denied*, 490 U.S. 1028 (1989). The Ohio Supreme Court has rejected the contention that on independent review the Eighth Amendment mandates unanimity by appellate courts to ensure constitutionally required reliability. *Id.*

review. By analogy, this Court's holdings in *Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860 (1988), and *McKoy v. North Carolina*, 494 U.S. 433, 110 S. Ct. 1227 (1990), indicate otherwise. In *Mills* and *McKoy*, this Court found as unconstitutional jury instructions that prohibited an individual juror from considering mitigation unless the entire jury unanimously found that the mitigation existed. *Mills*, 108 S. Ct. at 1870; *McKoy*, 110 S. Ct at 1231-32. This Court, focusing on the individual sentencing requirements of *Lockett* and *Eddings*, held that the Constitution precluded a state from constructing sentencing procedures that would prevent an individual juror from considering relevant evidence merely because other jurors did not agree. *Id.* This Court recognized that, to ensure an individualized sentence, *all* of the jurors must be free to consider the evidence they believe to exist. *Id.*

Given the fact that the most important factor in capital sentencing is *"individualized"* sentencing, nothing in this Court's previous opinions dictates that appellate court judges are prohibited from considering a statutory aggravating circumstance they find to exist on independent review, merely because a majority of the appellate court disagrees. *Ramos*, 463 U.S. at 1008; *Barclay*, 463 U.S. at 958; *Stephens*, 462 U.S. at 879 (emphasis in original). Richmond is not entitled to relief on this claim under *Teague*.

B. The Record Before the Court Is Sufficient To Support the Conclusion Reached by the Minority Justices That Richmond Committed This Crime in an Especially Depraved Manner, and This Claim Is Governed by *Lewis v. Jeffers*.

Assuming this Court agrees that minority justices may consider their finding of an aggravating circumstance, the question still remains what standard of review

applies to the minority position in a federal habeas corpus petition. Federal habeas corpus review of a state court's application of a constitutionally narrowed aggravating circumstance is limited to determining whether the state court's findings were so "arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Jeffers*, 110 S. Ct. at 3102. In making this determination, the federal courts are to give deference to the state court's application of its own law and not to engage in *"de novo"* review. *Id.* Instead, the courts are to review the finding under the "rational fact-finder" standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). *Jeffers*, 110 S. Ct. at 3102-03. That standard consists of asking "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found" the aggravating circumstance to exist. *Id.* (citing *Jackson*, 443 U.S. at 319, emphasis in original). A state court's finding that an aggravating circumstance exists in a particular case is "arbitrary and capricious," thereby giving rise to a constitutional violation, "if and only if no reasonable sentencer could have so concluded." 110 S. Ct. at 3103. The State believes this standard would also apply to a minority finding on an aggravating circumstance.

1. The facts, viewed in the light most favorable to the prosecution, demonstrate the reasonableness of the minority justices' position on the finding of "heinousness."

The evidence, viewed in the light most favorable to the prosecution, shows the following. While Rebecca Corella was prostituting herself with Bernard Crummett, Richmond told his 15-year-old girlfriend, Faith Erwin, that they were going to rob Crummett but not to say

anything. (J.A. at 23.) The three codefendants and Crummett left in a station wagon, with Richmond driving. (*Id.* at 23-24.) Richmond drove to a desert location near "A" mountain, where Richmond turned the car around, and then stopped. (*Id.* at 36.) After Richmond stopped the car, Crummett was told that they had a flat tire. (*Id.* at 23-24.) When Richmond and Crummett got out of the car, Richmond hit Crummett "with his fist and knocked him out." (*Id.* at 24.) While Crummett lay unconscious on the ground, Richmond walked around the car to the desert and retrieved some large rocks that were 6 to 8 inches across. (*Id.* at 24-25.) Richmond returned to where Crummett lay, and standing over him, hurled the rocks at the helpless man, striking him in the head. (*Id.* at 25.) When Erwin saw the blood after Richmond threw the rocks, she became sick and returned to the car. (R.T. Vol III at 478.)[11] Richmond got in the car and backed the car over Crummett and then threw it in gear and ran over him again. (J.A. at 26, 36; R.T. Vol. III at 480-81.) The autopsy evidence indicated that Richmond waited at least 30 seconds

---

[11] Erwin's testimony on why she got back in the car is not precise. On direct examination, she stated that she got sick because she was "high" on heroin. (J.A. at 26.) On cross-examination she stated:

> A I thought he was going to knock him out, and leave. But then I got curious and when I saw the rocks, that is when I saw him throwing them.
>
> . . . .
>
> Q Alright. And then it was after that point that you got back in the car?
>
> A I went back around. I saw all the blood, and I didn't feel good.

(R.T. Vol. III at 478.)

from the first pass of the car until he ran over Crummett the second time. (J.A. at 20.)[12]

A defendant's actions will constitute the aggravating circumstance of especially heinous or depraved if they fall into one of the following categories: (1) relishing in the murder; (2) infliction of gratuitous violence upon the victim above that necessary to complete the object of the crime; (3) needless mutilation of the victim; (4) senseless crime; or (5) helpless victim. *State v. Gretzler*, 659 P.2d at 11. Richmond concedes in his brief before this Court that this is the test in Arizona. (Opening Brief at 28 n.13.)

In applying this test, the minority justices found as follows:

> In *Gretzler, supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again

---

[12] There was contradictory evidence presented on some of the points stated above. Under the *Jeffers* standard, however, a federal court in a habeas corpus action does *not* attempt to review the record *"de novo"* to determine what it believes the facts show and how they should apply to the State's aggravating circumstance. *Jeffers*, 110 S. Ct. at 3102. Rather, the federal court reviews the evidence *"in the light most favorable to the prosecution."* *Id.* at 3102-03 (emphasis added).

> the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

(J.A. at 86-87.) Richmond's infliction of gratuitous violence upon the victim above that necessary to complete the object of the crime (i.e., robbery) was sufficient to show an especially heinous and depraved mind. *Gretzler*, 659 P.2d at 11; *accord*, *State v. Zaragoza*, 659 P.2d 22, 28 (Ariz.), *cert. denied*, 462 U.S. 1124 (1983) (murder of 78-year-old mentally impaired woman after rape and robbery was gratuitous violence because defendant could have accomplished criminal goal without killing her); *see also State v. Marlow*, 786 P.2d 395, 401 (Ariz. 1989) (killing done after defendant had completed robbery evidenced gratuitous violence); *State v. Correll*, 715 P.2d 721 (Ariz. 1986) (encouraging codefendant to kill after completing robbery evidence of depraved mind); *State v. Gillies*, 691 P.2d 655 (Ariz. 1984), *cert. denied*, 470 U.S. 1059 (1985) (killing to eliminate rape victim as a witness evidences depravity). Also, deliberately running over a person a second time, after waiting a minimum of 30 seconds, was sufficient evidence to believe it was done with the intent to mutilate the corpse.

The Ninth Circuit panel, upon reviewing the evidence and applicable Arizona standard, found that "a rational factfinder could indeed have found Crummett's murder heinous or depraved so as to warrant the penalty of death." (J.A. at 128.) The four dissenting judges on the motion for rehearing en banc focused not on the evidence in the "light most favorable to the prosecution," but instead recited the factual dispute regarding who was the driver of the car. (J.A. at 141.) The dissenting judges recognized that, implicit in the state court's minority

justices' finding[13] that the heinous circumstance existed, was the fact that Richmond drove the car. (J.A. at 139, 141, 143.) They challenged, however, the Arizona Supreme Court's ability to resolve the dispute over who drove the car, and claimed that, without the trial court's explicit resolution of the issue, the appellate court could not find the heinous circumstance to exist. The dissenting judges' reasoning and conclusions are erroneous, and so is Richmond's reliance on them in this Court.

2. The Arizona Supreme Court did not err in concluding that the trial court had found that Richmond drove the car that killed Crummett.

The trial court found that the crime was both cruel and depraved. A.R.S. § 13-703(F)(6) states that an aggravating circumstance exists if "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner." Under Arizona law at the time, the Arizona Supreme Court had defined how the State was to prove heinousness.

> In determining whether a murder has been committed in an especially heinous or depraved manner, we must necessarily consider the *killer's state of mind at the time of the offense*. This state of mind may be shown by his behavior at or near the time of the offense.

[13] The dissenting en banc judges did not appear to recognize that the finding that the aggravating circumstance existed was by only a minority of two Arizona Supreme Court justices. The dissenters repeatedly and incorrectly stated over and over again that the "Arizona Supreme Court" found the heinous circumstance to exist. (J.A. at 139, 141-42, 144 n.4, 145, 149.)

State v. Lujan, 604 P.2d 629, 636 (Ariz. 1979) (emphasis added).[14] At Richmond's resentencing, defense counsel cited this part of the *Lujan* opinion to the trial court, and argued that the State had failed to prove the circumstance. (J.A. at 71.) The trial court rejected Richmond's argument finding "that the Defendant did commit the offense in this case in an especially heinous and cruel manner." (J.A. at 74.) On appeal, on review of Richmond's *Enmund* claim the supreme court stated:

> The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony. The circumstances show that appellant was the driver when the group left for the desert. The

[14] Richmond challenges the trial court's application of (F)(6) to his case because it was applied before the Arizona Supreme Court's limiting construction in *Gretzler*. (Opening Brief at 27-30.) Because a majority of the Arizona Supreme Court found that the circumstance did not exist, the trial court's application of the circumstance was vacated and its determination on the matter rendered irrelevant. *Richmond v. Ricketts*, 640 F. Supp. at 795-96. The sole issue now is whether the Arizona Supreme Court, after vacating that finding, complied with *Barclay*, *Ramos*, and *Stephens* in affirming the sentence. Because Richmond misconstrues what the Arizona Supreme Court did in *Gretzler*, the State will respond briefly to the claim. First, *Gretzler* did not announce a new rule of construction for (F)(6). *Gretzler* catalogued the Arizona Supreme Court's cases dealing with (F)(6), and stated that future cases should fit within its categories. Before the supreme court issued *Gretzler*, a trial court judge, who is presumed to know and apply the law, was able to review the Arizona Supreme Court cases dealing with (F)(6) and apply the circumstance. *See Walton*. If *Gretzler*'s limitation is constitutional, the cases decided before *Gretzler* must also be constitutional because *Gretzler*'s categories were based on those decisions.

> other woman, Becky Corella, was so short in stature that it was difficult for her to operate an automobile. Appellant was the leader of the group and directed the operation. With such support we believe the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim.

(J.A. at 84.) This position was joined by the concurring justices. (J.A. at 92.) It appears that the trial court did conclude that Richmond was the driver.

Richmond contends, however, that the Arizona Supreme Court failed to determine who was driving the car. (Opening Brief at 32-33.) Such a contention is without merit given the above-cited part of Justice Holohan's opinion that was joined by a majority of the court. Also, as recognized by the dissenters in the Ninth Circuit, Justice Holohan's opinion regarding the existence of the heinous aggravating factor is contingent on the fact that Richmond drove the car. Justice Cameron's concurring opinion does not disagree on this point because he found only that heinousness was not shown based on his belief that there was insufficient evidence that Richmond knew or should have known that the victim was dead after the first pass of the car. (J.A. at 94.) Justice Feldman likewise did not take issue with the majority justices that the trial court implicitly found that Richmond was the driver. The Arizona Supreme Court's determination that the trial court found that Richmond was the driver is accorded a presumption of correctness under 28 U.S.C. § 2254. *Parker*, 111 S. Ct. at 739.

In *Clemons*, this Court rejected the claim that written findings were necessary to conduct appellate review. 110 S. Ct. at 1449. This Court has likewise recognized that appellate review of implied factual findings is not a violation of due process. *Wainwright v. Witt*, 469 U.S. 412, 431 (1985) (trial court not obligated to state reasoning for excluding juror when it is implicit from the record); *see*

also Sumner v. Mata, 455 U.S. 591, 597-98 (1982) (federal court must give state appellate court presumption of correctness for factual findings under 28 U.S.C. § 2254); *Sumner v. Mata*, 449 U.S. 539, 545-47 (1981) (same). In these cases, the federal courts were asked to review specific claims that, if true, were direct constitutional violations. Under the habeas corpus provisions of § 2254(d), this Court held that the federal courts must presume the factual predicates found by the state court to be correct. However, in *Jeffers* this Court found that the federal courts had to extend more than a mere presumption of correctness when the question presented was whether or not a state aggravating factor existed, because the resolution of that question necessarily was a matter of state law, "errors of which are not cognizable in federal habeas proceedings." 110 S. Ct. at 3103. If a state appellate court may rely on implicit factual findings regarding direct constitutional claims, it is unfathomable why it may not be permitted to do so when the claim goes only to a matter of state law. The Arizona Supreme Court did not err by determining that the trial court had made an implicit finding.

Next Richmond claims that, if the Arizona Supreme Court did make the implicit finding, it would violate *Bullock*, 474 U.S. at 388 n.5, because the court would be unable to do so on a paper record. (Opening Brief at 33.) Again, the resolution of this contention lies in the type of claim being presented in the habeas petition. In *Bullock*, this Court was faced with the question whether there was an *Enmund* Eighth Amendment violation. In discussing the procedures necessary to acquire a presumption of correctness under § 2254(d), this Court noted that under some circumstances an appellate determination in the first instance may not be "adequate." 474 U.S. at 388 n.5. When, however, the claim is simply a matter of state law,

the *Jeffers* standard applies. Under this standard, the habeas court reviews the entire record in the light most favorable to the prosecution, and affirms if the record is sufficient for any rational sentencer to find the result reached. *Jeffers*, 110 S. Ct. at 3102-03.

In the instant case, Justice Holohan's opinion states why the evidence supports the trial court's implicit finding. The only factual dispute Richmond raises is the claim that his confession to the police is more consistent with the physical evidence than Erwin's testimony because *he* told the police that Crummett was run over by the car twice, whereas Erwin said that Richmond was driving and their car hit Crummett only once. (Opening Brief at 33 n.16.) This would seem *to support*, not detract, from the Arizona Supreme Court's finding. Who better to know exactly how many times he ran over the victim than the driver of the car? Both women were aware of only one pass, Richmond admitted there were two. Erwin's testimony that Richmond was driving the car, read in conjunction with Richmond's confession that the car ran over Crummett twice, clearly supports the conclusion of the trial court and the Arizona Supreme Court.

Richmond takes issue with the conclusion reached by the minority justices, that he engaged in corpse mutilation, claiming such a holding "would require a finding that he purposely ran over the victim a second time after he was dead." (Opening Brief at 34.) The State disagrees that such a finding is required under Arizona law, but nonetheless believes the record supports such a finding. The evidence in the light most favorable to support the conclusion is that Richmond drove the car to the end of the dead end street and turned the car around. (J.A. at 36.) Richmond then assaulted Crummett, rendering him unconscious. (J.A. at 24-25.) Richmond got in his car and

backed over the victim's head. (J.A. at 36.) Because Richmond had already turned the car around, no other reason exists for the first pass of the car but to kill or maim. This was needless violence that the minority justices could have relied on to find gratuitous violence above the object of the crime. But Richmond did not stop there. He waited at least 30 seconds, and then he ran over the victim again. (J.A. at 20, 36.) Under this interpretation of the facts, the second pass was clearly an attempt either to maim or to render more injuries to the victim. Either way, Richmond's actions supported the minority position that Richmond engaged in corpse mutilation.[15] The Arizona Supreme Court majority's disagreement on the interpretation of the evidence does not detract from the evidence supporting the factual and legal conclusions reached by the minority justices. Richmond is not entitled to relief on this claim.

II. THE CONSTITUTION DOES NOT REQUIRE A REMAND TO THE STATE COURT TO DETERMINE WHETHER A STATE COURT JUSTICE INDEPENDENTLY REVIEWED THE RECORD WHEN THAT JUSTICE INDICATED IN HIS OPINION THAT HE CONCURRED WITH THE MAJORITY OPINION THAT INCLUDED THE REQUIREMENT THAT THE STATE SUPREME COURT INDEPENDENTLY REVIEW THE RECORD.

Richmond also claims that Justice Cameron's opinion violates *Clemons* because Justices Cameron and Gordon

---

[15] Richmond contends that this reading of the record would present a due process problem because his attorney had elicited this damning evidence in the first instance. (Opening Brief at 33-34 n.17.) Richmond never claimed a due process violation in the state court, nor did he raise it in this habeas corpus petition. This due process claim is also not fairly subsumed in the question presented on certiorari to this Court.

did not indicate that they had independently reviewed the record and reweighed the mitigation against the remaining aggravating circumstances in reaching the conclusion that the death penalty was appropriate. (Opening Brief at 37.) Richmond argues that this asserted error is not harmless because Arizona is a "weighing" state, and that the Ninth Circuit panel opinion mischaracterizes Arizona law in not addressing this issue. (J.A. at 128-32.) For the reasons stated below, the State agrees in part and disagrees in part, but believes that the record in this case does not warrant a remand.

A. Arizona Is a Weighing State in That the Sentencing Body Must Weigh the Aggravating Circumstances Against All Relevant Factors in Determining if the Death Penalty Should Be Imposed.

The Ninth Circuit's panel opinion held that Arizona was not a weighing state as this Court defined that term. (J.A. at 131-32.) The court reasoned:

> [A] conclusion by the Arizona courts that there are no substantial mitigating circumstances is separate from and independent of any conclusion regarding the existence of aggravating circumstances.

(J.A. at 132.) While such a holding finds support from a reading of the words of the statute, the Arizona Supreme Court has interpreted the statute to require a weighing of the mitigating circumstances against the aggravating circumstances:

> The statute does not require that the number of aggravating circumstances be weighed against the number of mitigating circumstances. One mitigating circumstance, for example, may be "sufficiently substantial" to outweigh two aggravating circumstances. The converse is also true – one aggravating circumstance could be so substantial that two or more mitigating circumstances would not be "sufficiently substantial to call for leniency." . . . *Both the trial court and this court then must "weigh" the mitigating circumstances against the aggravating circumstances to determine if leniency is required.*

State v. Brookover, 601 P.2d 1322, 1326 (Ariz. 1979) (citations omitted).

In Richmond's first appeal before the Arizona Supreme Court, that court stated that its duty was to determine for itself if the aggravation outweighed the mitigation. (J.A. at 61.) In the second appeal, that court found that it had an independent duty to determine the weight of both the aggravation and mitigation and the propriety of the death sentence. (J.A. at 88.) The Ninth Circuit's opinion cannot be affirmed on the basis that Arizona does not weigh aggravation against mitigation. However, the result can and should be affirmed for the reasons stated below.

B. The Record Reveals That Justices Cameron and Gordon Independently Reviewed the Record, as State Law Requires, and Independently Determined That the Death Penalty Was Appropriate.

A federal habeas corpus court not only reviews the record of a case, but also considers state law in determining the ramifications of a state court opinion or decision. *Coleman v. Thompson*, ___ U.S. ___, 111 S. Ct. 2546, 2558-60 (1991). In Arizona, the state supreme court is an integral part of the sentencing determination, having imposed upon itself the requirement that every death penalty case be automatically appealed to it. Rule 31.2(b), Ariz. R. Crim. P. In that automatic appeal, the justices of the Arizona Supreme Court independently review the record

to determine for themselves "the presence or absence of aggravating and mitigating circumstances and the weight to give each," and also "independently determine the propriety of the sentence." (J.A. at 88.)

> [T]he propriety of the death penalty is not for the defendant or the trial court alone to decide. That decision rests also with this court upon automatic appeal and is guided, above all, by the state's narrowly construed statutes specifying the limited circumstances for which a defendant may be deemed death-eligible.

State v. Brewer, 826 P.2d at 791.

The Arizona Supreme Court has maintained from the first death penalty case after *Furman* that it would independently review the record and decide the propriety of the death penalty by determining the weight of the aggravation and mitigation and "determine for ourselves if the latter outweigh the former when we find both to be present." (J.A. at 61.) This is a position the Arizona Supreme Court has consistently maintained, as can be seen by the attached tables cataloging all of the capital cases reviewed by that court. In each case that the court was called on to review whether the aggravation outweighed mitigation thereby making the death penalty appropriate, the Arizona Supreme Court has stated that it has independently weighed mitigation against the aggravation.

In both of Richmond's appeals before the Arizona Supreme Court, that court set forth its standard in reviewing death sentences. (J.A. at 61, 88.) The concurring opinion of Justice Cameron, joined by Justice Gordon, begins by stating:

> I agree that the death penalty is *properly* imposed in this case. However, because I disagree with the majority in its holding that the

> crime was especially heinous and depraved, I feel that I must specially concur.

(J.A. at 92, emphasis added.) After discussing why he believed that the crime was not heinous and depraved, Justice Cameron concluded:

> The criminal record of this defendant, however, clearly places him above the norm of first degree murderers. He has been convicted of another first degree murder and a kidnapping, each arising in separate incidents. This history of serious violent crime justifies the imposition of the death penalty.
>
> I concur in the opinion of the majority *except its finding that this crime was heinous and depraved*, and I concur in the result.

(J.A. at 95-96, emphasis added.) Justice Cameron's statement that he agreed that the death penalty was "properly imposed" necessarily reflected his view that in this case the mitigation was not "sufficiently substantial to warrant leniency." A.R.S. § 13-703(C). Such a conclusion is mandated because a death penalty is not "properly imposed" in Arizona unless the sentencing body makes this determination.

Richmond claims that Justice Cameron could not have been concurring with Justice Holohan's opinion on the issue of independent review because that part of the opinion included in its weighing process the aggravating circumstance of heinous and depraved. Such a conclusion requires a Herculean jump in logic, and totally ignores Arizona law. Justice Cameron wrote that he concurred in Justice Holohan's opinion that stated the Arizona Supreme Court was required to independently review the record to determine if there was aggravation or mitigation and the weight to give each, and that the death penalty was required if mitigation was not "sufficiently substantial to call for leniency." (J.A. at 88.) Justice Cameron concurred that the death penalty was justifiable in

light of Richmond's prior record. (J.A. at 96.) If Justice Cameron disagreed with Justice Holohan's opinion on how Richmond's mitigation was to be viewed by the court, he would have stated that he disagreed. (*See* Justice Feldman's dissent.) Because he specifically concurred with Justice Holohan's opinion except for heinousness, no further elaboration was required.

To read Justice Cameron's opinion to mean he did not independently consider the mitigation would require this Court to hold that Justice Cameron did not follow the very law recited in the opinion with which he specifically concurred. Also, it would require this Court to disregard the seven opinions written by Justice Cameron prior to Richmond's appeal wherein he specifically stated that an independent review of the record was required by the Arizona Supreme Court, including weighing of aggravation and mitigation. (See tables 4-8.) One of those Cameron opinions is *State v. Watson*, 129 Ariz. 60, 628 P.2d 943 (1981), the very opinion Justice Feldman used to explain why he believed Richmond's changed-character evidence was entitled to more weight. Admittedly, the concurring jurists could have been clearer in their opinion if they had indicated specifically how the mitigation weighed in their decision. However, it is not the prerogative of a habeas corpus court to "tell state courts how they must write their opinions." *Coleman*, 111 S. Ct. at 2559. Given Arizona law, and the language of the very opinion at issue, Justices Cameron and Gordon clearly followed the law in Arizona and concluded that death was appropriate. A remand is not required.

Richmond makes a related argument that the majority analysis of the mitigation was flawed because it was not independent from the trial court's assessment, and that it misconstrued what the trial court found. (Opening Brief at 38.) The State has found no cases from this Court

that dictate that a reviewing court may not rely on the lower court's assessment of mitigation in reweighing the aggravation and mitigation. To the extent Richmond is arguing that this Court should now make such a ruling, it is barred by *Teague*. Furthermore, the majority did not misconstrue the trial court's finding. Under Arizona law, the burden of proving mitigation is on the defendant. *State v. Leslie*, 708 P.2d 719, 730 (Ariz. 1985). The failure to prove the existence of mitigation by a preponderance of the evidence precludes the trial court from finding the mitigating circumstance. *Id.* This procedure is constitutional. *Walton*, 110 S. Ct. at 3055-56 (plurality opinion).

After considering all of Richmond's evidence, the trial court concluded that it was "unable to make a definitive finding." (J.A. at 75.) A majority of the Arizona Supreme Court interpreted that finding as meaning that the trial court was not "convinced that [Richmond's] character could be viewed as a mitigating factor," and explained why the trial court was justified in arriving at that conclusion. (J.A. at 89.) Under Arizona law, Richmond's failure to convince the trial court that he had changed his character precludes consideration of that factor in mitigation. The district court, after analyzing the evidence, concurred with the Arizona Supreme Court. (*See* footnote 5 supra.) The Arizona Supreme Court did not err on this matter.[16]

CONCLUSION

This case presents the Court with a microcosm of what is truly wrong with our criminal justice system

---

[16] Respondents concur with Richmond that if this Court finds reversible error under either of Richmond's arguments, the writ should issue and the case referred to the Arizona Supreme Court for further review. (Opening Brief at 42.)

regarding capital litigation – the unending delay in carrying out the law. Richmond presents no claim that he is factually innocent of any crime. In fact, he stipulates to the core facts – he participated in a robbery to the point of striking an unconscious victim with rocks, and the victim died in furtherance of that robbery. Richmond must admit that this is not his first involvement in serious criminal activity. He has prior convictions for first-degree murder and armed kidnapping, putting him in the elite of death row inmates.[17] Richmond's contentions lie in claiming that the Arizona Supreme Court erred by not anticipating many of this Court's recent decisions in writing their opinion in 1983. No justification exists for further review. The trial court has twice reviewed the evidence and determined that death was appropriate. The Arizona Supreme Court has twice affirmed the propriety of the death sentence on independent review. Further review mandated by this Court would undeniably violate the principles of comity and finality articulated by this Court in *Teague*. Accordingly, the Ninth Circuit Court of Appeals' decision should be affirmed.

Respectfully submitted,

GRANT WOODS
Attorney General

PAUL J. MCMURDIE
Chief Counsel
Criminal Appeals Section
(Counsel of Record)

JACK ROBERTS
Assistant Attorney General

Attorneys for RESPONDENTS

---

[17] In this country, while 7 out of 10 death row inmates may have prior convictions, only 1 in 11 death row inmates have prior homicide convictions. Bureau of Justice Statistics Bulletin, Capital Punishment 1990, U.S. Department of Justice, at 1.

APPENDICES

TABLE 1

Arizona Death Penalty Cases
Conviction Reversed or Sentence Vacated as a Matter of Law and Remanded for a New Trial or a Resentencing

State v. Ceja 113 Ariz. 39 546 P.2d 6 (1976) (Struckmeyer)	Reversed the conviction and remanded for a new trial.
State v. Watson 114 Ariz. 1 559 P.2d 121 (1976) (Cameron) *cert. denied* 430 U.S. 986 (1977)	The court held that the trial court improperly excised material from the presentence report and remanded for resentencing.
State v. Treadaway 116 Ariz. 163 568 P.2d 1061 (1977) (Gordon)	Reversed conviction because of admission of evidence, and remanded for a new trial.
State v. Evans 120 Ariz. 158 584 P.2d 1149 (1978) (Holohan)	Remanded for resentencing pursuant to *State v. Watson*.
State v. Steelman 120 Ariz. 301 585 P.2d 1213 (1978) (Cameron)	Remanded for resentencing pursuant to *State v. Watson*.
State v. Watson 120 Ariz. 441 586 P.2d 1253 (1978) (Cameron) *cert. denied* 440 U.S. 924 (1979)	Remanded for resentencing because of unconstitutional limitation on mitigating circumstances.

Table 1-2

State v. Morales 120 Ariz. 517 587 P.2d 236 (1978) (Cameron)	Reversed the conviction because of limitation on cross-examination, remanded for a new trial.
State v. Melandez 121 Ariz. 1 588 P.2d 294 (1978) (Cameron)	Reversed the conviction because of limitation on cross-examination, remanded for a new trial.
State v. Valencia 121 Ariz. 191 589 P.2d 434 (1979) (Cameron)	Remanded for resentencing pursuant to *State v. Watson*.
State v. Edwards 122 Ariz. 206 594 P.2d 72 (1979) (Hays) *rev'd* 451 U.S. 477 (1981)	Remanded for resentencing pursuant to *State v. Watson*.
State v. Smith (J.C.) 123 Ariz. 231 599 P.2d 187 (1979) (Gordon)	Remanded for resentencing pursuant to *State v. Watson*.
State v. Valencia 124 Ariz. 139 602 P.2d 807 (1979) (Hays)	Remanded for resentencing because the trial court received ex parte information relating to the sentencing.
State v. Dunlap 125 Ariz. 104 608 P.2d 41 (1980) (Gordon)	Reversed the conviction because of limitation on cross-examination, remanded for a new trial.
State v. Robison 125 Ariz. 107 608 P.2d 44 (1980) (Holohan)	Reversed the conviction because of limitation on cross-examination, remanded for a new trial.

Table 1-3

State v. Gretzler 126 Ariz. 60 612 P.2d 1023 (1980) (Cameron)	Remanded for resentencing pursuant to *State v. Watson*.
State v. McDaniel 127 Ariz. 13 617 P.2d 1129 (1980) (Cameron)	Reversed the conviction because of limitation on cross-examination, remanded for a new trial.
State v. McVay 127 Ariz. 450 622 P.2d 9 (1980) (Cameron)	Reversed conviction because of improper admission of hearsay, remanded for a new trial.
State v. Emery 131 Ariz. 493 642 P.2d 838 (1982) (Hays)	Reversed conviction because of admission of confession that it held was involuntary, remanded for a new trial.
State v. Poland 132 Ariz. 269 645 P.2d 784 (1982) (Cameron)	Reversed conviction because of juror misconduct, remanded for a new trial.
State v. Carriger 132 Ariz. 301 645 P.2d 816 (1982) (Cameron)	Vacated sentence because of ineffective assistance of counsel, remanded for resentencing.
State v. McLoughlin 133 Ariz. 458 652 P.2d 531 (1982) (Gordon)	Reversed conviction because of juror misconduct, remanded for a new trial.
State v. McMurtrey 136 Ariz. 93, 101 664 P.2d 637, 645 (1983) (Gordon) *cert. denied* 464 U.S. 858 (1983)	Vacated sentence because the trial court appeared to erroneously conclude that certain evidence could not support a mitigating circumstance.

Table 1-4

State v. Rumsey 136 Ariz. 166 665 P.2d 48 (1983) (Feldman) *aff'd*, 467 U.S. 203 (1984)	Vacated sentence because resentencing was double jeopardy, sentence reduced to life.
State v. Smith (Roger) 136 Ariz. 273 665 P.2d 995 (1983) (Hays)	Vacated sentence because of ineffective assistance of counsel, remanded for resentencing.
State v. Leslie 136 Ariz. 463 666 P.2d 1072 (1983) (Hays)	Affirmed order granting resentencing because the trial court received ex parte information relating to the sentencing.
State v. Hensley 137 Ariz. 80 669 P.2d 58 (1983) (Feldman)	Vacated sentence because, when the defendant's attorney agreed to submit the case to the trial court on the basis of a stipulated record, the defendant's attorney did not realize or intend that the trial court would rely on those exhibits in determining the sentence; remanded for resentencing.
State v. Routhier 137 Ariz. 90 669 P.2d 68 (1983) (Holohan) *cert. denied* 464 U.S. 1073 (1984)	Reversed conviction because improper questioning about the defendant's conduct after he exercised his right to remain silent, remanded for a new trial.
State v. Spoon 137 Ariz. 105 669 P.2d 83 (1983) (Gordon)	Reversed conviction because of admission of the defendant's confession taken in violation of *Edwards*, remanded for a new trial.

Table 1-5

State v. Jordan 137 Ariz. 504 672 P.2d 169 (1983) (Hays)	Remanded because the trial court failed to hold a hearing on the defendant's claim that the trial court improperly became involved in the plea negotiations.
State v. Cruz 137 Ariz. 541 672 P.2d 470 (1983) (Gordon)	Reversed conviction because the trial court failed to sever trials of codefendants, remanded for a new trial.
State v. Vickers 138 Ariz. 450 675 P.2d 710 (1983) (per curiam)	Reversed conviction because of an improper jury instruction, remanded for a new trial.
State v. Walker 138 Ariz. 491 675 P.2d 1310 (1984) (Holohan)	Reversed conviction because of improper jury instructions, remanded for a new trial.
State v. Emery 141 Ariz. 549 688 P.2d 175 (1984) (Gordon)	Reduced sentence to life because there was no evidence that the defendant killed, attempted to kill, or intended to kill.
State v. Schad 142 Ariz. 619 691 P.2d 710 (1984) (Hays)	Reversed conviction because of an improper jury instruction, remanded for a new trial.
State v. McMurtrey 143 Ariz. 71 691 P.2d 1099 (1984) (Cameron)	Vacated sentence because the trial court required the defendant to prove mitigation beyond a reasonable doubt, remanded for resentencing.
State v. Rossi 146 Ariz. 359 706 P.2d 371 (1985) (Gordon)	Remanded for resentencing because the trial court used the wrong standards for determining and applying mitigating circumstances.

Table 1-6

State v. Tittle 147 Ariz. 339 710 P.2d 449 (1985) (Gordon)	Reversed conviction because of an improper jury instruction, remanded for a new trial.
State v. Correll 148 Ariz. 468 715 P.2d 721 (1986) (Cameron)	Reduced one of three sentences to life because the evidence did not show that the defendant killed, attempted to kill, or intended to kill that victim.
State v. Mauro 149 Ariz. 24 716 P.2d 393 (1986) (Hays) *rev'd* 481 U.S. 520 (1987)	Reversed conviction because of admission of the defendant's confession taken in violation of *Edwards*, remanded for a new trial.
State v. Fisher 152 Ariz. 116 730 P.2d 825 (1986) (Cameron)	Remanded for a new hearing on the defendant's claim of newly-discovered evidence.
State v. Rossi 154 Ariz. 245 741 P.2d 1223 (1987) (Gordon)	Remanded for resentencing because the trial court erroneously concluded that the defendant had not proved two mitigating circumstances.
State v. Charo 156 Ariz. 561 754 P.2d 288 (1988) (Holohan)	Reversed conviction because erroneous admission of hearsay evidence, remanded for a new trial.
State v. Lopez (George V.) 158 Ariz. 258 762 P.2d 545 (1988) (Moeller)	Reversed the robbery conviction, and then reversed the murder conviction because the jurors were instructed on both premeditated murder and felony murder, remanded for a new trial.

Table 1-7

State v. Tison 160 Ariz. 501 774 P.2d 805 (1989) (per curiam)	Remanded for resentencing because the trial court failed to hold an evidentiary hearing.
State v. Fulminante 161 Ariz. 237 778 P.2d 602 (1989) (Cameron) *aff'd* 111 S. Ct. 1246 (1991)	Reversed conviction because of the admission of a confession that it concluded was involuntary, and remanded for a new trial.
State v. Romanosky 162 Ariz. 217 782 P.2d 693 (1989) (Moeller)	Reversed conviction because of admission of irrelevant evidence that showed the commission of other crimes, and remanded for a new trial.
State v. Connor 163 Ariz. 97 786 P.2d 949 (1990) (Moeller)	Reduced the sentence to life because the trial court erroneously allowed the state to withdraw from the plea agreement.
State v. Mathers 165 Ariz. 64 796 P.2d 866 (1990) (Moeller)	Reversed conviction because it concluded that the evidence was not sufficient to support the conviction.

Table 2-1

TABLE 2

ARIZONA DEATH PENALTY CASES
AGGRAVATING CIRCUMSTANCES AND NO
MITIGATING CIRCUMSTANCES SENTENCE AFFIRMED
WITHOUT A NEED FOR WEIGHING

State v. Jordan 114 Ariz. 452, 456 561 P.2d 1224, 1228 (1976) (Hays) *vacated* 438 U.S. 911 (1978)	Pursuant to its independent review of the facts, the court affirmed the finding of four aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency, therefore did not have to weigh; affirmed the sentence.
State v. Knapp 114 Ariz. 531, 542 562 P.2d 704, 715 (1977) (Hays) *cert. denied* 435 U.S. 908 (1978)	Pursuant to its independent review of the facts, the court affirmed the finding of one aggravating circumstance and no mitigating circumstances, therefore did not have to weigh; affirmed the sentence.
State v. Holsinger 115 Ariz. 89, 98 563 P.2d 888, 897 (1977) (Cameron)	Pursuant to its independent review of the facts, the court affirmed the finding of three aggravating circumstances and no mitigating circumstances, therefore did not have to weigh; affirmed the sentence.
State v. Ceja 115 Ariz. 413, 416 565 P.2d 1274, 1277 (1977) (Hays) *cert. denied* 434 U.S. 975 (1977)	Pursuant to its independent review of the facts, the court reversed the finding of one of the aggravating circumstances, affirmed the finding of the other aggravating circumstance, and affirmed the finding of no mitigating circumstances, and therefore did not have to weigh; affirmed the sentence.

Table 2-2

State v. Bishop 118 Ariz. 263, 269 576 P.2d 122, 128 (1978) (Holohan) *vacated* 439 U.S. 810 (1978)	Pursuant to its independent review of the facts, the court affirmed the finding of one aggravating circumstance and no mitigating circumstances, therefore did not have to weigh; affirmed the sentence.
State v. Arnett 119 Ariz. 38, 51 579 P.2d 542, 555 (1978) (Hays)	Pursuant to its independent review of the facts, the court affirmed the finding of two aggravating circumstances and no mitigating circumstances, therefore did not have to weigh; affirmed the sentence.
State v. Carriger 123 Ariz. 335 599 P.2d 788 (1979) (Hays) *cert. denied* 444 U.S. 1049 (1980)	Defendant challenged the constitutionality of the statute, but did not challenge the findings of aggravating and mitigating circumstances; the court affirmed the conviction and sentence.
State v. Evans 124 Ariz. 526, 528 606 P.2d 16, 18 (1980) (Hays) *cert. denied* 449 U.S. 891 (1980)	In an earlier opinion, the court affirmed the finding of one aggravating circumstance; in this opinion, pursuant to its independent review of the facts, it affirmed the finding of no mitigating circumstances and therefore did not have to weigh; affirmed the sentence.
State v. Mata (Luis) 125 Ariz. 233, 242 609 P.2d 48, 57 (1980) (Gordon) *cert. denied* 449 U.S. 938 (1980)	Pursuant to its independent review of the facts, the court affirmed the finding of two aggravating circumstances and no mitigating circumstances, and therefore did not have to weigh; affirmed the sentence.

State v. Smith (Sylvester) 125 Ariz. 412, 417 610 P.2d 46, 51 (1980) (Struckmeyer)	Pursuant to its independent review of the facts, the court affirmed the finding of one aggravating circumstance and no mitigating circumstances, and therefore did not have to weigh; affirmed the sentence.
State v. Jordan 126 Ariz. 283 614 P.2d 825 (1980) (Gordon) *cert. denied* 449 U.S. 986 (1980)	Pursuant to its independent review of the facts, the court affirmed the finding of two aggravating circumstances and no mitigating circumstances, and therefore did not have to weigh; affirmed the sentence.
State v. Bishop 144 Ariz. 521 698 P.2d 1240 (1985) (Holohan)	Rejected the defendant's claim that he was entitled to a unanimous jury on the question of premeditated murder or felony murder, and affirmed the conviction and sentence.
State v. Evans 147 Ariz. 57 708 P.2d 738 (1985) (Holohan)	Rejected the defendant's claim that his prior conviction was not a crime of violence, and affirmed the sentence.
State v. Serna 167 Ariz. 373 807 P.2d 1109 (1991) (Moeller) *cert. denied* 112 S. Ct. 214 (1991)	Affirmed the trial court's denial of a motion for a new trial based on newly-discovered evidence.

TABLE 3

Arizona Death Penalty Cases Sentence Reduced to Life or Remanded for Resentencing Because Court Struck All Aggravating Circumstances

State v. Verdugo 112 Ariz. 288, 292 541 P.2d 388, 392 (1975) (Struckmeyer)	Pursuant to its independent review of the facts, the court struck the only aggravating circumstance and reduced the sentence to life.
State v. Murphy 113 Ariz. 416 555 P.2d 1110 (1976) (Holohan)	The court set aside the one aggravating circumstance as a matter of law and reduced the sentence to life.
State v. Lee 114 Ariz. 101, 105 559 P.2d 657, 661 (1976) (Holohan)	Pursuant to its independent review of the facts, the court held that there was insufficient proof for the two aggravating circumstances and set them aside, and remanded for resentencing.
State v. Lujan 124 Ariz. 365, 372 604 P.2d 629, 636 (1979) (Gordon)	Pursuant to its independent review of the facts, the court set aside the only aggravating circumstance and reduced the sentence to life.
State v. Madsen 125 Ariz. 346, 352 609 P.2d 1046, 1052 (1980) (Cameron) *cert. denied* 449 U.S. 873 (1980)	Pursuant to its independent review of the facts, the court set aside the only two aggravating circumstances and reduced the sentence to life.

State v. Prince 160 Ariz. 268, 275 772 P.2d 1121, 1128 (1989) (Moeller)	Reduced the sentence to life because the state failed to prove the one aggravating circumstance, and remanded for the trial court to determine whether the sentence would be consecutive to the other sentences.

TABLE 4

Arizona Death Penalty Cases Stating Independent Weighing Conviction and Sentence Affirmed No Changes in the Aggravating or Mitigating Circumstances

State v. Richmond 114 Ariz. 186, 196 560 P.2d 41, 51 (1976) (Holohan) *cert. denied* 433 U.S. 915 (1977)	The court affirmed the finding of two aggravating circumstances and no mitigating circumstances, and pursuant to its independent review, affirmed the sentence.
State v. Blazak 114 Ariz. 199, 206 560 P.2d 54, 61 (1977) (Struckmeyer)	The court affirmed the finding of four aggravating circumstances and no mitigating circumstances, and pursuant to its independent review, affirmed the sentence.
State v. Arnett 125 Ariz. 201, 204 608 P.2d 778, 781 (1980) (Cameron)	In an earlier opinion, the court had affirmed the finding of one aggravating circumstance; in this opinion, it reviewed the trial court's finding of no mitigating circumstances sufficiently substantial to call for leniency, and pursuant to its independent review, affirmed the sentence.
State v. Knapp 125 Ariz. 503 611 P.2d 90 (1979) (Hays)	The trial court found one aggravating and one mitigating circumstance; the court held that life was not mandatory when there was one aggravating circumstance and one mitigating circumstance, but instead only when the mitigating circumstances are sufficiently substantial to call for leniency, and affirmed the sentence.

Table 4-2

State v. Ceja 126 Ariz. 35, 40 612 P.2d 491, 496 (1980) (Hays)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; the court affirmed the finding of the one aggravating circumstance, and upon its review of the mitigation presented, found no mitigating circumstances that would indicate that the imposition of the death penalty was inappropriate, and pursuant to its independent review, affirmed the sentence.
State v. Bishop 127 Ariz. 531, 535 622 P.2d 478, 482 (1980) (Holohan)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and pursuant to its independent weighing, found that the mitigation was not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Britson 130 Ariz. 380, 389 636 P.2d 628, 637 (1981) (Gordon)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and pursuant to its independent weighing, found that the mitigation was not sufficiently substantial to call for leniency, and affirmed the sentence.

Table 4-3

State v. Smith (J.C.) 131 Ariz. 29, 31 638 P.2d 696, 698 (1981) (Struckmeyer)	Pursuant to its independent review of the facts, the court agreeed with the trial court that the defendant failed to establish any mitigating circumstances; the court concluded that, because there were several aggravating circumstances and no mitigating circumstances sufficient to overcome the aggravating circumstances, the sentence of death was proper.
State v. Gerlaugh 135 Ariz. 89, 89 659 P.2d 642, 642 (1983) (Hays)	The trial court found three aggravating circumstances and one mitigating circumstance; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and pursuant to its independent weighing, found that the mitigation was not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Woratzeck 134 Ariz. 452, 456 657 P.2d 865, 869 (1982) (Hays)	The trial court found two aggravating circumstances and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances and no mitigating circumstances, and pursuant to its independent review, affirmed the sentence.

Table 4-4

State v. Zaragoza 135 Ariz. 63, 68 659 P.2d 22, 27 (1983) (Gordon) *cert. denied* 462 U.S. 1124 (1983)	The trial court found two aggravating circumstances and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances and rejected all of the defendant's proposed mitigating circumstances, and pursuant to its independent review, affirmed the sentence.
State v. Adamson 136 Ariz. 250, 266 665 P.2d 972, 988 (1983) (Gordon) *cert. denied* 464 U.S. 865 (1983)	The trial court found two aggravating circumstances and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and held that the mitigating circumstances were not sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.
State v. Richmond 136 Ariz. 312, 320 666 P.2d 57, 65 (1983) (Holohan) *cert. denied* 464 U.S. 986 (1983)	The trial court found three aggravating circumstances and five mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and held that the mitigating circumstances were not sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.

Table 4-5

State v. Harding 137 Ariz. 278, 293 670 P.2d 383, 398 (1983) (Cameron) *cert. denied* 465 U.S. 1013 (1984)	The trial court found four aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the four aggravating circumstances, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.
State v. Lambright 138 Ariz. 63, 75 673 P.2d 1, 13 (1983) (Cameron) *cert. denied* 469 U.S. 892 (1984)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the aggravating circumstance, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.
State v. Smith (Robert) 138 Ariz. 79, 85 673 P.2d 17, 23 (1983) (Cameron) *cert. denied* 465 U.S. 1074 (1984)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the aggravating circumstance, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance, and affirmed the sentence.

Table 4-6

State v. Summerlin 138 Ariz. 426, 436 675 P.2d 686, 696 (1983) (Cameron)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.
State v. Libberton 141 Ariz. 132, 139 685 P.2d 1284, 1291 (1984) (Hays)	The trial court found two aggravating circumstances and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.
State v. Fisher 141 Ariz. 227, 253 686 P.2d 750, 776 (1984) (Gordon) *cert. denied* 469 U.S. 1066 (1984)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.

Table 4-7

State v. Chaney 141 Ariz. 295, 313 686 P.2d 1265, 1283 (1984) (Hays)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance, and affirmed the sentence.
State v. Harding 141 Ariz. 492, 500 687 P.2d 1247, 1255 (1984) (Hays)	The trial court found four aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the four aggravating circumstances, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.
State v. Villafuerte 142 Ariz. 323, 332 690 P.2d 42, 51 (1984) (Cameron) *cert. denied* 469 U.S. 1230 (1985)	The trial court found one aggravating circumstance and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance, and affirmed the sentence.

Table 4-8

State v. Clabourne 142 Ariz. 335, 348 690 P.2d 54, 67 (1984) (Cameron)	The trial court found one aggravating circumstance and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance, and affirmed the sentence.
State v. Gillies 142 Ariz. 564, 571 691 P.2d 1059, 1066 (1984) (Hays) *cert. denied* 470 U.S. 1059 (1985)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance, and affirmed the sentence.
State v. Hensley 142 Ariz. 598, 603 691 P.2d 689, 694 (1984) (Gordon)	The trial court found one aggravating circumstance and one mitigating circumstance; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found that the one mitigating circumstance was not sufficiently substantial to outweigh the one aggravating circumstance, and affirmed the sentence.

Table 4-9

State v. Carriger 143 Ariz. 142, 162 692 P.2d 991, 1011 (1984) (Hays) *cert. denied* 471 U.S. 1111 (1985)	The trial court found three aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Nash 143 Ariz. 392, 404 694 P.2d 222, 234 (1985) (Gordon) *cert. denied* 471 U.S. 1143 (1985)	The trial court found three aggravating circumstances and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and found no mitigating circumstances, and affirmed the sentence.
State v. Gerlaugh 144 Ariz. 449, 465 698 P.2d 694, 710 (1985) (Hays)	On petition for post-conviction relief, the trial court found that the proposed mitigation would not have changed the sentence; the court concluded that there was no reasonable probability that the proposed mitigation would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances.

Table 4-10

State v. Roscoe 145 Ariz. 212, 226 700 P.2d 1312, 1326 (1984) (Feldman) *cert. denied* 471 U.S. 1094 (1985)	The trial court found one aggravating circumstance and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Martinez-Villareal 145 Ariz. 441, 451 702 P.2d 670, 680 (1985) (Holohan) *cert. denied* 474 U.S. 975 (1985)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. McMurtrey 151 Ariz. 105, 110 726 P.2d 202, 207 (1986) (Cameron) *cert. denied* 480 U.S. 911 (1987)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.

Table 4-11

State v. Wallace 151 Ariz. 362, 366 728 P.2d 232, 236 (1986) (Hays) *cert. denied* 483 U.S. 1011 (1987)	The trial court found one aggravating circumstance and one mitigating circumstance; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found that the one mitigating circumstance was not sufficiently substantial to call for leniency, and affirmed two of the three sentences.
State v. LaGrand (Karl) 152 Ariz. 483, 489 733 P.2d 1066, 1072 (1987) (Gordon) *cert. denied* 484 U.S. 872 (1987)	The trial court found three aggravating circumstances and three mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and found that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. LaGrand (Walter) 153 Ariz. 21, 34 734 P.2d 563, 576 (1987) (Gordon) *cert. denied* 484 U.S. 872 (1987)	The trial court found three aggravating circumstances and three mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and found that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.

Table 4-12

State v. Moorman 154 Ariz. 578, 587 744 P.2d 679, 688 (1987) (Feldman)	The trial court found three aggravating circumstances and one mitigating circumstance; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and found that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Beaty 158 Ariz. 232, 242 762 P.2d 519, 529 (1988) (Cameron) *cert. denied* 491 U.S. 910 (1989)	The trial court found one aggravating circumstance and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Vickers 159 Ariz. 532, 544 768 P.2d 1177, 1189 (1989) (Cameron) *cert. denied* 110 S. Ct. 3298 (1990)	The trial court found five aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the five aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.

Table 4-13

State v. Walton 159 Ariz. 571, 586 769 P.2d 1017, 1032 (1989) (Holohan) *aff'd* 110 S. Ct. 3047 (1990)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. McCall 160 Ariz. 119, 131 770 P.2d 1165, 1177 (1989) (Moeller) *cert. denied* 110 S. Ct. 3289 (1990)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentences.
State v. Wallace 160 Ariz. 424, 428 773 P.2d 983, 987 (1989) (Fernandez) *cert. denied* 110 S. Ct. 1513 (1990)	The trial court found one aggravating circumstance and one mitigating circumstance, which it concluded was not sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and agreed that the one mitigating circumstance was not sufficiently substantial to call for leniency, and affirmed the sentences.

Table 4-14

State v. Serna 163 Ariz. 260, 269 787 P.2d 1056, 1065 (1990) (Moeller)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Washington 165 Ariz. 51, 61 796 P.2d 853, 863 (1990) (Roll) *cert. denied* 111 S. Ct. 1091 (1991)	The trial court found two aggravating circumstances and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Comer 165 Ariz. 413, 428 799 P.2d 333, 348 (1990) (Contreras) *cert. denied* 111 S. Ct. 1404 (1991)	The trial court found three aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.

Table 4-15

State v. Williams 166 Ariz. 132, 141 800 P.2d 1240, 1249 (1987) (Feldman) *cert. denied* 111 S. Ct. 2043 (1991)	The trial court found two aggravating circumstances and no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of the two aggravating circumstances, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Amaya-Ruiz 166 Ariz. 152, 177 800 P.2d 1260, 1285 (1990) (Corcoran) *cert. denied* 111 S. Ct. 2044 (1991)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Stanley 167 Ariz. 519, 528 809 P.2d 944, 953 (1991) (Hathaway) *cert. denied* 112 S. Ct. 660 (1991)	The trial court found three aggravating circumstances and five mitigating circumstances, but concluded that they were not sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the three aggravating circumstances, and agreed that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.

Table 4-16

State v. Lavers 168 Ariz. 376, 391 814 P.2d 333, 348 (1991) (Gordon) *cert. denied* 112 S. Ct. 343 (1991)	The trial court found three aggravating circumstances for one killing and two aggravating circumstances for the other, and found four mitigating circumstances, but concluded that they were not sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of all of the aggravating circumstances, and agreed that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentences.
State v. White 168 Ariz. 500, 512 815 P.2d 869, 881 (1991) (Cameron) *cert. denied* 112 S. Ct. 1199 (1992)	The trial court found one aggravating circumstance and eight mitigating circumstances, but concluded that they were not sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and agreed that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Cook 170 Ariz. 40, 60 821 P.2d 731, 751 (1991) (Feldman)	The trial court found three aggravating circumstances for one killing and two aggravating circumstances for the other, and found no mitigating circumstances; pursuant to its independent review of the facts, the court affirmed the finding of all of the aggravating circumstances, and found that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentences.

Table 4-17

State v. Greenway 170 Ariz. 155, 168 823 P.2d 22, 35 (1991) (Cameron)	The trial court found three aggravating circumstances and found one mitigating circumstance; pursuant to its independent review of the facts, the court affirmed the finding of all three of the aggravating circumstances, and found that the mitigating circumstance was not sufficiently substantial to call for leniency, and affirmed the sentences.
State v. Rossi 109 Ariz. Adv. Rep. 22, 23 (Apr. 2, 1992) (Moeller)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Atwood 110 Ariz. Adv. Rep. 3, 50 (Apr. 9, 1992) (Corcoran)	The trial court found one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency; pursuant to its independent review of the facts, the court affirmed the finding of the one aggravating circumstance, and found that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.

TABLE 5

Arizona Death Penalty Cases with Independent Weighing Conviction and Sentence Affirmed Changes in the Aggravating or Mitigating Circumstances

State v. Steelman 126 Ariz. 19, 27 612 P.2d 475, 483 (1980) (Cameron) *cert. denied* 449 U.S. 913 (1980)	The trial court found four aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; the court affirmed three and struck one of the aggravating circumstances, found that the defendant established one mitigating circumstance, and upon its weighing, held that the one mitigating circumstance was not sufficiently substantial when compared to the aggravating circumstances, and affirmed the sentence.
State v. Clark 126 Ariz. 428 616 P.2d 888 (1980) (Holohan) *cert. denied* 449 U.S. 1067 (1980)	The trial court found three aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; the court affirmed two and struck one of the aggravating circumstances, and upon its weighing, held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.

State v. Greenawalt 128 Ariz. 150, 176 624 P.2d 828, 854 (1981) (Struckmeyer) *cert. denied* 454 U.S. 882 (1981)	The trial court found four aggravating circumstances and no mitigating circumstances; the court affirmed two of the aggravating circumstances but did not address the other two, held that the evidence did not support any of the claimed mitigating circumstances, and pursuant to its obligation to review the imposition of each death penalty, concluded that the punishment was neither excessive or disproportionate to the offenses committed, and affirmed the sentence.
State v. Vickers 129 Ariz. 506, 516 633 P.2d 315, 325 (1981) (Cameron)	The trial court found four aggravating circumstances and no mitigating circumstances; the court affirmed all four of the aggravating circumstances, affirmed the trial court's rejection of two mitigating circumstances, but found a mitigating circumstance that the trial court did not find, but pursuant to its independent weighing, held that the mitigating circumstance was not sufficiently substantial to call for leniency, and affirmed the sentence.

Table 5-3

State v. Tison (Ricky) 129 Ariz. 526, 545 633 P.2d 335, 354 (1981) (Struckmeyer) *cert. denied* 459 U.S. 882 (1982)	The trial court found three aggravating circumstances and three mitigating circumstances; the court affirmed two and struck one of the aggravating circumstances, and upon its weighing, held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Tison (Raymond) 129 Ariz. 546, 556 633 P.2d 355, 365 (1981) (Struckmeyer) *cert. denied* 459 U.S. 882 (1982)	The trial court found three aggravating circumstances and three mitigating circumstances; the court affirmed two and struck one of the aggravating circumstances, and upon its weighing, held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Schad 129 Ariz. 557, 574 633 P.2d 366, 383 (1981) (Hays) *cert. denied* 455 U.S. 983 (1982)	The trial court found two aggravating circumstances and two mitigating circumstances; the court affirmed the two aggravating circumstances, struck one of the mitigating circumstances, rejected other claimed mitigation, and upon its weighing, held that the remaining mitigating circumstance was not sufficiently substantial to call for leniency, and affirmed the sentence.

Table 5-4

State v. Ortiz 131 Ariz. 195, 211 639 P.2d 1020, 1036 (1981) (Gordon) *cert. denied* 456 U.S. 984 (1982)	The trial court found three aggravating circumstances and several possible mitigating circumstances; the court affirmed two and struck one of the aggravating circumstances, and held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Blazak 131 Ariz. 598, 603 643 P.2d 694, 699 (1982) (Cameron) *cert. denied* 459 U.S. 882 (1982)	The trial court found five aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; the court affirmed four and struck one of the aggravating circumstances, and held that there were still enough aggravating circumstances that could not be overcome by the mitigating circumstances, and affirmed the sentence.
State v. Gretzler 135 Ariz. 42, 54 659 P.2d 1, 13 (1983) (Cameron) *cert. denied* 461 U.S. 971 (1983)	The trial court found four aggravating circumstances and one mitigating circumstance; the court affirmed all four aggravating circumstances and the one mitigating circumstance, but held that two of the aggravating circumstances were such that all of the mitigation that the defendant presented was not sufficiently substantial to overcome them, and affirmed the sentence.

Table 5-5

State v. Jeffers 135 Ariz. 404, 428 661 P.2d 1105, 1129 (1983) (Holohan) *cert. denied* 464 U.S. 865 (1983)	The trial court found two aggravating circumstances and no mitigating circumstances; the court affirmed one and struck one of the aggravating circumstances, rejected all of the defendant's proposed mitigating circumstances, and pursuant to its independent weighing, affirmed the sentence.
State v. McCall 139 Ariz. 147, 160 677 P.2d 920, 933 (1983) (Gordon) *cert. denied* 467 U.S. 1220 (1984)	The trial court found three aggravating circumstances and no mitigating circumstances; the court affirmed two and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. James 141 Ariz. 141, 148 685 P.2d 1293, 1300 (1984) (Hays) *cert. denied* 469 U.S. 990 (1984)	The trial court found two aggravating circumstances and no mitigating circumstances; the court affirmed one and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that there were no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.

Table 5-6

State v. Smith (Roger) 141 Ariz. 510, 512 687 P.2d 1265, 1267 (1984) (Hays)	The trial court found three aggravating circumstances and no mitigating circumstances; the court affirmed two and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that there were no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Tison (Ricky) 142 Ariz. 446, 448 690 P.2d 747, 749 (1984) (Hays) *vacated* 481 U.S. 137 (1987)	Appellant incorporated all of the issues raised on the direct appeal; the court stated that it would not consider these issues again.
State v. Tison (Raymond) 142 Ariz. 454, 457 690 P.2d 755, 758 (1984) (Hays) *vacated* 481 U.S. 137 (1987)	Appellant incorporated all of the issues raised on the direct appeal; the court stated that it would not consider these issues again.
State v. Poland (Patrick) 144 Ariz. 388, 407 698 P.2d 183, 202 (1985) (Cameron) *aff'd* 476 U.S. 147 (1986)	The trial court found three aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; the court affirmed two and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.

Table 5-7

State v. Poland (Michael) 144 Ariz. 412, 416 698 P.2d 207, 211 (1985) (Cameron) *aff'd* 476 U.S. 147 (1986)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; the court affirmed two and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Bracy 145 Ariz. 520, 536 703 P.2d 464, 480 (1985) (Gordon) *cert. denied* 474 U.S. 1110 (1986)	The trial court found five aggravating circumstances and no mitigating circumstances; the court affirmed four and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that there were no mitigating circumstances, and affirmed the sentence.
State v. Hooper 145 Ariz. 538, 550 703 P.2d 482, 494 (1985) (Gordon) *cert. denied* 474 U.S. 1073 (1986)	The trial court found five aggravating circumstances and no mitigating circumstances; the court affirmed four and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that there were no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances, and affirmed the sentence.

Table 5-8

State v. Smith (Bernard) 146 Ariz. 491, 501 707 P.2d 289, 299 (1985) (Feldman)	The trial court found five aggravating circumstances and no mitigating circumstances; the court affirmed three and struck two of the aggravating circumstances, and pursuant to its independent weighing, held that there were no mitigating circumstances, and affirmed the sentence.
State v. Correll 148 Ariz. 468, 483 715 P.2d 721, 736 (1986) (Cameron)	The trial court found four aggravating circumstances and no mitigating circumstances; the court affirmed three and struck one of the aggravating circumstances, and pursuant to its independent weighing, held that there were no mitigating circumstances sufficiently substantial to call for leniency, and affirmed two of the three sentences.
State v. Castaneda 150 Ariz. 382, 395 724 P.2d 1, 14 (1986) (Cameron)	The trial court found five aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; the court affirmed three and struck two of the aggravating circumstances, and pursuant to its independent weighing, held that the mitigating circumstances were not sufficiently substantial to call for leniency, and affirmed the sentence.

Table 5-9

State v. Arnett 158 Ariz. 15, 21 760 P.2d 1064, 1070 (1988) (Cameron)	The trial court found two aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency; the court concluded that, because the two aggravating circumstances were based on the same prior conviction, the trial court could only count this once, but held that remand was not necessary because it concluded that there were no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.
State v. Schad 163 Ariz. 411, 421 788 P.2d 1162, 1172 (1989) (Holohan) *aff'd* 111 S. Ct. 2491 (1991)	The trial court found three aggravating circumstances and several mitigating circumstances, but concluded that they were not sufficiently substantial to call for leniency; the court concluded that, because two of the aggravating circumstances were based on the same prior conviction, the trial court could only count this once, but held that remand was not necessary because it concluded that the mitigating circumstances were not sufficiently substantial to outweigh any of the aggravating circumstances, and affirmed the sentence.

Table 5-10

State v. Robinson 165 Ariz. 51, 61 796 P.2d 853, 863 (1990) (Roll) *cert. denied* 111 S. Ct. 1025 (1991)	The trial court found three aggravating circumstances and no mitigating circumstances; the court struck one of the three aggravating circumstances, but agreed that there were no mitigating circumstances, and affirmed the sentence.
State v. Brewer 106 Ariz. Adv. Rep. 3, 10 (Jan. 28, 1992) (Corcoran)	The trial court found two aggravating circumstances and one mitigating circumstance; the court struck one of the two aggravating circumstances, but agreed that there were no mitigating circumstances sufficiently substantial to call for leniency, and affirmed the sentence.

Table 6-1

TABLE 6

ARIZONA DEATH PENALTY CASES STATING INDEPENDENT WEIGHING SENTENCE REDUCED TO LIFE NO CHANGES IN THE AGGRAVATING OR MITIGATING CIRCUMSTANCES

State v. Valencia 132 Ariz. 248, 251 645 P.2d 239, 242 (1982) (Cameron)	The trial court found two aggravating circumstances and one mitigating circumstance, but found that it was not sufficiently substantial to call for leniency; the court affirmed the two aggravating circumstances, but upon its weighing, held that the one mitigating circumstance was sufficiently substantial to call for leniency, and reduced the sentence to life, but ordered that it would be consecutive to the defendant's other sentence that he received.
State v. Stevens 158 Ariz. 595, 598 764 P.2d 724, 727 (1988) (Lacagnina)	The trial court found one aggravating circumstance and one mitigating circumstance, but found that it was not sufficiently substantial to call for leniency; the court affirmed the one aggravating circumstance, but upon its weighing, held that the one mitigating circumstance was sufficiently substantial to outweigh the aggravating circumstance, and reduced the sentence to life, and ordered that the defendant's other sentence would be consecutive to the murder sentence.

Table 6-2

State v. Mauro 159 Ariz. 186, 207 766 P.2d 59, 80 (1988) (Corcoran)	The trial court found two aggravating circumstances and one mitigating circumstance, but found that it was not sufficiently substantial to call for leniency; the court upon its weighing held that the one mitigating circumstance was sufficiently substantial to outweigh the aggravating circumstances, and reduced the sentence to life, followed by another sentence that the trial court had made consecutive to the murder sentence.
State v. Jimenez 165 Ariz. 444, 459 779 P.2d 785, 800 (1990) (Corcoran)	The trial court found two aggravating circumstances and two mitigating circumstances, but found that they were not sufficiently substantial to call for leniency; the court affirmed the one aggravating circumstance, but upon its weighing, held that the one mitigating circumstance was sufficiently substantial to outweigh the aggravating circumstances, and reduced the sentence to life, which by statute had to be consecutive to another sentence that the defendant received.

TABLE 7

Arizona Death Penalty Cases Stating Independent Weighing Sentence Reduced to Life Changes in the Aggravating or Mitigating Circumstances

State v. Doss 116 Ariz. 156, 163 568 P.2d 1054, 1061 (1977) (Holohan)	The court affirmed the finding of the one aggravating circumstance, but found a mitigating circumstance that the trial court did not find; pursuant to its independent weighing, it reduced the sentence to life.
State v. Brookover 124 Ariz. 38, 42 601 P.2d 1322, 1326 (1979) (Cameron)	The court struck one of two aggravating circumstances and found a mitigating circumstance that the trial court did not find; on its independent weighing, it reduced the sentence to life.
State v. Watson 129 Ariz. 60, 63 628 P.2d 943, 946 (1981) (Cameron) *cert. denied* 456 U.S. 981 (1982)	The court held that the trial court erred when it ruled that it could not consider in mitigation the defendant's conduct while in prison, and pursuant to its independent weighing, concluded that the mitigating circumstances presented were sufficient to overcome the aggravating circumstances, and reduced the sentence to life.
State v. Graham 135 Ariz. 209, 212 660 P.2d 460, 463 (1983) (Hays)	The court struck one of two aggravating circumstances, gave little weight to one mitigating circumstance, but found two mitigating circumstances that the trial court did not find; on its independent weighing, it reduced the sentence to life.

State v. McDaniel 136 Ariz. 188, 200 665 P.2d 70, 82 (1983) (Gordon)	The trial court found one aggravating circumstance and no mitigating circumstances; the court affirmed the one aggravating circumstance, but found a mitigating circumstance that the trial court did not find, and on its independent weighing, reduced the sentence to life, but ordered that it would be consecutive to the other sentences that the defendant had received.
State v. Johnson 147 Ariz. 395, 400 710 P.2d 1050, 1055 (1985) (Feldman)	The trial court found two aggravating circumstances and no mitigating circumstances; the court struck both of the aggravating circumstances, and remanded with directions for the trial court to impose a sentence of life consecutive to the other sentences that the defendant had received.
State v. Rockwell 161 Ariz. 5, 15 775 P.2d 1069, 1079 (1989) (Moeller)	The trial court found three aggravating circumstances and one mitigating circumstance; the court struck two of the three aggravating circumstances, and found additional mitigating circumstances that the trial court did not find, and on its independent weighing, reduced the sentence to life, and made it consecutive to other sentences that the defendant had received.

State v. Marlow 163 Ariz. 65, 72 786 P.2d 395, 402 (1989) (Foreman)	The trial court found three aggravating circumstances and no mitigating circumstances; the court struck one of the three aggravating circumstances and held that the other two could only be counted as one, and found a mitigating circumstance that the trial court did not find, and on its independent weighing, reduced the sentence to life, and noted that the trial court had already made the other sentence consecutive to the murder sentence.
State v. Fierro 166 Ariz. 539, 548 804 P.2d 72, 81 (1990) (Feldman)	The trial court found three aggravating circumstances and no mitigating circumstances; the court struck one of the three aggravating circumstances and found two mitigating circumstances; pursuant to a proportionality review, the court concluded that the killing was not above the norm of first degree murders, and reduced the sentence to life, but ordered that it be consecutive to the other sentence that the defendant received.

TABLE 8

Arizona Death Penalty Cases Stating Independent Weighing Remanded for Resentencing Changes in the Aggravating or Mitigating Circumstances

State v. Gillies 135 Ariz. 500, 511 662 P.2d 1007, 1018 (1983) (Hays)	The trial court found four aggravating circumstances and that the mitigating circumstances were not sufficiently substantial to call for leniency; the court affirmed one and struck three of the aggravating circumstances, and on its independent weighing, held that the mitigating circumstances were not sufficiently substantial to outweigh the one aggravating circumstance, and affirmed; on rehearing, it held that it would be more appropriate to remand to the trial court for resentencing.
State v. Wallace 151 Ariz. 362, 366 728 P.2d 232, 236 (1986) (Hays) *cert. denied* 483 U.S. 1011 (1987)	The trial court found two aggravating circumstances and one mitigating circumstance; the court struck one of the aggravating circumstances, and remanded for a resentencing on this one of the three sentences that the defendant received.
State v. Lopez (Samuel V.) 163 Ariz. 108 786 P.2d 959 (1990) (Moeller)	Remanded for resentencing because the trial court erred in finding one of two aggravating circumstances and the court was not able to determine what the trial court would have done.

Table 8-2

State v. Hinchey 165 Ariz. 432 799 P.2d 352 (1990) (Gordon) *cert. denied* 111 S. Ct. 1589 (1991)	Remanded for resentencing because the trial court erred in finding one of the two aggravating circumstances, and the court was not able to determine whether the trial court would have concluded that the mitigating circumstances would not have outweighed the one remaining aggravating circumstance.
State v. Schaaf 169 Ariz. 323 819 P.2d 909 (1991) (Gordon)	Remanded for resentencing because the trial court erred in finding one of the two aggravating circumstances, and the court was not able to determine whether the trial court would have concluded that the mitigating circumstances would not have outweighed the one remaining aggravating circumstance.